Journal of Dispute Resolution

Volume 2025 | Issue 2 Article 6

2025

Looking Forward, Reflecting Back: The Promise of Dispute Resolution to Reform the Criminal Legal System

Cynthia Alkon

Looking Forward, Reflecting Back: The Promise of Dispute Resolution to Reform the Criminal Legal System

Cynthia Alkon[*]

I. INTRODUCTION

The criminal legal system in the United States is plagued by serious and systemic problems. There have been countless efforts at reform over the last many decades that have included changes in what is a crime,[1] how crimes are punished,[2] how prosecutors do their job,[3] and changes in policing.[4] Yet, despite these efforts, problems such as mass incarceration remain deeply embedded.[5] It is easy to be swept up in pessimism when discussing the criminal legal system. Change is hard, at best incremental, and we seem to be in the beginning of an era of backlash against recent reforms.[6] This is despite the widespread use of dispute resolution processes which are often looked to as processes that can contribute to meaningful change. Why have these processes and reforms had such limited impacts?

---

* Professor of Law, Director of the Criminal Law, Justice, & Policy Program, Texas A&M University School of Law. Thank you to Ilhyung Lee for inviting me to be a part of this conversation and to my fellow panelists, Jennifer Robbennolt and Rachel Wechsler. Thank you also to Andrea Kupfer Schneider and Sanda Kaufman.

1. *See, e.g.*, Proposition 47, Criminal Sentences. Misdemeanor Penalties. Initiative Statute., CAL. SEC'Y OF STATE: OFFICIAL VOTER INFO. GUIDE (NOV. 4, 2014), https://vigarchive.sos.ca.gov/2014/general/en/propositions/47/title-summary.htm (under Proposition 47 some drug and theft offenses were reduced to misdemeanors); Patrick McLaughlin & Liya Palagashvili, Counting the Code: How Many Criminal Laws Has Congress Created, Policy Brief, GEORGE MASON U. MERCATUS CTR. (Jan. 17, 2023), https://www.mercatus.org/research/policy-briefs/counting-the-code-congress-criminal-laws (finding the total number of federal crimes has grown by 36% since 1994 and half the total growth in number of crimes happened between 1994-1996).

2. *See* Nicole D. Porter, Top Trends in Criminal Legal Reform, 2023, THE SENTENCING PROJECT (Dec. 20, 2023), https://www.sentencingproject.org/reports/top-trends-in-criminal-legal-reform-2023/; see also Jeremy Travis & Bruce Western, The Era of Punitive Excess, BRENNAN CTR. FOR JUST. (Apr. 13, 2023), https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess.

3. *See, e.g.*, David Alan Sklansky, The Progressive Prosecutor's Handbook, 50 U.C. DAVIS REV. 25, 39 (2017) (suggesting ways newly elected progressive prosecutors should do their jobs differently from predecessors); see generally Jenny Roberts, Defense Lawyering in the Progressive Prosecution Era, 109 CORNELL L. REV. 1067 (2024) (recommending that defense lawyers' role remains to get the best outcomes for clients and how to approach this with a progressive prosecutor).

4. Geoff Bennett et al., How Policing has Changed 4 Years After George Floyd's Murder, PBS NEWS (May 27, 2024, 6:35 PM), https://www.pbs.org/newshour/show/how-policing-has-changed-4-years-after-george-floyds-murder.

5. *See* Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2024, PRISON POL'Y INITIATIVE (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html (over 1.9 million people are held in custody in the United States).

6. Kayla Gaskins, Rough Elections for Progressive Policies as Voters Oust Prosecutors, Approve Tougher Policies, BALTIMORE SUN (Nov. 11, 2024, 1:46 PM), https://www.baltimoresun.com/2024/11/10/rough-election-for-progressive-policies-as-voters-oust-prosecutors-approve-tougher-penalties/; Tyler Katzenberger et al., California Deals Criminal Justice Reform a Crushing Blow, POLITICO (Nov. 6, 2024, 5:19 PM), https://www.politico.com/news/2024/11/06/california-deals-criminal-justice-reform-big-losses-00187973.

As this article will discuss, each dispute resolution process currently being used in the criminal legal system could make far-reaching changes. Yet, each fails to reach that potential due to how the process has been introduced and is used. One problem is the failure to recognize, except in passing, that the criminal legal system is an intractable or wicked problem.[7] This means it is a highly complex system (or multiple systems) with a variety of unpredictable and interconnected problems. Reformers all too often continue to propose piecemeal or isolated changes that fail to recognize this complexity and plan accordingly.

Dispute resolution processes are deeply embedded into the criminal legal system. Plea bargaining, the negotiation of criminal cases, remains the dominant process to resolve criminal cases nationwide. Just as the criminal legal system is highly resistant to reform, so is plea bargaining. Despite decades of criticism and calls for changes, plea bargaining, for the most part, remains unchanged.

More recently, new processes were introduced. Since 1989, when the first drug court started in Dade County, Florida, judges around the country have started drug courts, mental health courts, and veterans courts.[8] These courts are often called "problem-solving courts" as they aim to address the root causes (or problems) underlying crime and criminal behavior and thereby reduce recidivism. Despite problem solving courts being widely adopted, they have had limited impact in the criminal legal system as a whole.[9] Reformers outside the criminal legal system have called for increasing use of restorative justice, but these programs tend to operate largely separately from standard criminal case processing.

This article will also explore the potential for dispute resolution to drive meaningful reform in the criminal legal system without overlooking hard realities that continue to stand in the way. It will begin by analyzing why the criminal legal system is an intractable or wicked problem and how this impacts reform efforts. Next, this article will examine the central role of plea bargaining, its criticisms, and the challenges of reforming this entrenched practice. As will be discussed, plea bargaining remains both a serious problem and, ironically, the process that has the greatest potential to move towards innovative improvements in the criminal legal system. The discussion will then turn to problem-solving courts, highlighting their innovative approaches and the barriers they face. Next, the transformative potential of restorative justice will be analyzed, along with its limitations and opportunities

---

7. *See, e.g.*, John S. Callender, M.D., Neuroscience and Criminal Justice: Time for a "Copernican Revolution?", 63 WM. & MARY L. REV. 1119, 1155 (2022) ("Despite the existence of a vast and expensive apparatus of criminal punishment, we have a seemingly intractable problem of crime."); Abbe Smith, Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender, 37 U.C. DAVIS L. REV. 1203, 1238 (2004); Margareth Etienne, Pain and Race: A New Understanding of Race-Based Sentencing Disparities, 3 U. SAINT THOMAS L. J. 496, 498–99 (2006) (discussing racial disparities as an intractable problem but not applying a wicked problem analysis as will be discussed infra Section I); John M. Junker, Guidelines Sentencing: The Washington Experience, 25 U.C. DAVIS L. REV. 715, 749 (1992); Gale A. Norton, Comments on Zimring and Hawkin's Crime is Not the Problem: Lethal Violence in America, 69 U. COLO. REV. 1163 (1998) ("We are assisted in better understanding an intractable problem by examining it from as many angles as possible.").

8. KRISTEN DEVALL ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON TREATMENT COURTS IN THE UNITED STATES 12–13 (Nat'l Drug Court Res. Ctr. 2022), https://issuu.com/ndcrc/docs/pcp_nationalreport_combined_content_2022_5_22_23_d.

9. *See generally* Cynthia Alkon, Have Problem-Solving Courts Changed the Practice Law?, 21 CARDOZO J. CONFLICT RESOL. 597 (2020) [hereinafter "Have Problem-Solving Courts Changed the Practice Law?"] (discussing the limited impact of problem-solving courts in the criminal legal system as a whole).

for broader integration. Mediation in criminal cases will also be considered as a flexible tool for resolving cases. Finally, the article will discuss how dispute system design could contribute to meaningful reforms by providing an interest-based framework through which processes can be introduced and/or improved. This article aims to encourage broader systemic thinking about how dispute resolution practices can contribute to meaningful reform. This kind of systemic thinking could focus on improvements to the system; making it a justice system (not simply a legal system) that improves safety and rehabilitation. As this article will discuss, reform efforts should recognize that the criminal legal system is an intractable problem and move away from proposals for reform that fail to recognize complexity.

II. INTRACTABLE PROBLEMS

Planning and dispute resolution professionals recognize that intractable problems require a different approach. Intractable problems, or wicked problems, are often described as "unfixable problems."[10] Single solutions or reforms do not fix intractable problems. For example, simply increasing criminal penalties, as was done in the 1980s-1990s in the United States, did not eliminate crime.[11] These simple solutions can instead spark new and unintended consequences, such as mass incarceration. For the purposes of this discussion, it is first important to understand the basic definition of an intractable or wicked problem in the context of the criminal legal system. This section will then discuss the importance of being able to distinguish between a complicated or a complex problem and why that distinction matters in considering criminal legal system reform. Finally, this section will discuss the importance of approaching intractable problems differently and how this could contribute to meaningful criminal legal reform.

Intractable problems are social problems that are "inherently different from the problems that scientists" deal with.[12] Problems in the natural sciences are "definable and separable and may have solutions that are findable" and it is clear whether the problem has been solved.[13] In contrast, social problems "are ill-defined."[14] It is not easy to understand the various contributors to an intractable problem, much less the paths forward towards resolution. For example, there are potentially numerous causes of criminal behavior including poverty, trauma, mental illness, substance abuse, violence, access to illegal drugs, and access to guns and other weapons.

Taking just the first item on this list, policymakers and social scientists have struggled to understand the causes of poverty, much less to fully understand the impact of poverty on criminal behavior, and then to determine what changes might

10. *See* Peter T. Coleman & Robert Ricigliano, Getting in Sync: What to Do when Problem-Solving Fails to Fix the Problem, in 2 THE NEGOTIATOR'S DESK REFERENCE 467, 471–86 (Chris Honeyman & Andrea Kupfer Schneider eds. 2017).

11. Don Steman, The Mass Incarceration Myth: More Incarceration Will Not Reduce Crime, VERA INSTITUTE OF JUST. 1 (Jul. 2017), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-prison-paradox-incarceration-not-safer/legacy_downloads/for-the-record-myth-of-mass-incarceration.pdf ("Increases in incarceration rates have a small impact on crime rates and each additional increase in incarceration rates has a smaller impact on crime rates than previous increases.").

12. Horst W.J. Rittel & Melvin B. Webber, Dilemmas in a General Theory, 4 POL'Y SCI. 155, 160 (1973).

13. *Id*.

14. *Id*.

both reduce poverty and crime. As this example illustrates, an intractable problem has "an interconnected web of sub-problems."[15] Wicked problems are "unpredictable, and it may be nearly impossible to unequivocally link causes—such as plans and decisions—to their effects."[16]

If a problem is not intractable, it is considered "tame."[17] A "tame" problem:

- Has a relatively well-defined and stable problem statement.
- Has a definite stopping point, i.e., we know when a solution is reached.
- Has a solution which can be objectively evaluated as being right or wrong.
- Belongs to a class of similar problems which can be solved in a similar manner.
- Has solutions that can be tried and abandoned.[18]

The criminal legal system is not a tame problem. There is no well-defined or stable problem statement. Some consider the problem to be mass incarceration, some consider it to be over-policing, some consider the problem to be a lack of personal responsibility leading to criminal behavior, and others look to poverty, mental illness, or substance abuse as the cause or causes of criminal behavior. This means there is no single problem statement to consider when looking at what to reform in the criminal legal system. There is also no clear stopping point. Do decreased crime rates indicate a solution? Do decreased incarceration rates indicate a solution? Do increased rehabilitative programs indicate a solution? As these questions indicate, there is no single idea of the problem, so there is no clear stopping point. There is also no single reform that could be objectively right or wrong. It depends on the values of the people evaluating the problem. Is it objectively right to incarcerate many more people? Is it objectively right to incarcerate many fewer people? As a society we do not have one single answer to these questions.

Intractable problems do not have tame attributes. Instead, they are complex. A complex problem is one where the "elements . . . interact dynamically so their cumulative outcomes cannot be predicted with any degree of certainty . . ."[19] Something can be complicated but not complex. For example, "an airline engine is complicated, while air traffic control is complex."[20] Putting this in the criminal context, a criminal jury trial is complicated, while the criminal legal system is complex. The criminal legal system has numerous parts to it that interact in ways that are difficult, if not impossible to predict. For example, the policy decisions to increase penalties for criminal acts not only led to higher incarceration rates, but also impacted entire communities as more children were raised with one or both parents incarcerated

15. Calvin Chrustie et al., Negotiating Wicked Problems: Five Stories, in 2 RETHINKING NEGOTIATION TEACHING SERIES: VENTURING BEYOND THE CLASSROOM 449, 452 (Christopher Honeyman et al. eds. 2010).

16. Cynthia Alkon & Sanda Kaufman, A Theory of Interests in the Context of Hybrid Warfare: It's Complex, 24 CARDOZO CONFLICT RESOL. 581, 595 (2023).

17. See Chrustie et al., *supra* note 15, at 451–52.

18. *Id*. at 452–53.

19. Alkon & Kaufman, *supra* note 16, at 594.

20. *Id*. at 594–95.

during some or all of their childhood, which, in turn, impacted the child's risk for incarceration later in life.[21]

Peter Coleman and Robert Ricigliano explain the differences as those between a clock problem and a cloud problem.[22] A clock problem is something that is "more mechanical, knowable, controllable, and predictable."[23] These problems can be "broken down to their component parts and systematically studied to reveal the source of the problem…[and then] can be repaired and reassembled."[24] Cloud problems are "much more complex, murky, uncontrollable, and unpredictable."[25] These problems are "highly irregular and disorderly in nature . . . [with] many aspects . . . interact[ing] over time in unpredictable ways, and therefore evidence erratic behavior and outcomes."[26]

One marker of a complex system or problem is that it is difficult to isolate one factor and determine if that is what caused the change or if the same change happened again, if it would have the same effect.[27] For example, often individuals who are incarcerated will reflect on how time in jail helped them.[28] But, these individual stories are not necessarily transferrable and incarceration may not have the same impact on other individuals or, more crucially, a system-wide impact. For example, more recent studies of the impact of incarceration on juveniles have found that a common narrative that it will "scare them straight" or "give them a chance to reconsider their life choices" is not what happens to most juveniles sentenced to even short terms of incarceration.[29] Instead, incarceration increases the chances that they will end up in adult prisons with adult offenses.[30] These individual stories also do not consider whether having more readily available social services, mental health treatment, substance abuse treatment, housing assistance, or simply not being imprisoned might have been better interventions to help before people get to the point of incarceration. Beyond the question of whether some people might think they benefitted from serving time, it is still an open research question whether incarceration itself contributes to recidivism in adults, although studies have shown that pretrial incarceration does increase recidivism rates.[31]

---

21. *See generally* Eric Martin, Hidden Consequences: The Impact of Incarceration on Dependent Children, 278 NAT'L INST. JUST. J. 11, 12–15 (2017) (describing the various ways that having a parent incarcerated impacts children).

22. Coleman & Ricigliano, *supra* note 10, at 470–71.

23. *Id.* at 470.

24. *Id.*

25. *Id*.

26. *Id*. at 471.

27. *Id*. at 595.

28. *See e.g.*, Going to Jail Saved my Life: Episode 49, TRAUMA, TRIAL, TRANSFORMATION (Mar. 5, 2024), https://podcasts.apple.com/us/podcast/going-to-jail-saved-my-life/id1649845006?i=1000648133258; Don Terry, An Urban Garden Prepares Inmates for Green Collar Jobs, N.Y. TIMES (Sept. 17, 2011), https://www.nytimes.com/2011/09/18/us/an-urban-garden-prepares-inmates-for-green-collar-jobs.html ("Mr. Jones was 17 when he was arrested for aggravated vehicular hijacking. He could have received more than 15 years in prison but was sent to the boot camp and the garden that "changed my life."); Ryan Kulp, Going to Jail Saved my Life, RYAN KULP (Dec. 21, 2013), https://www.ryanckulp.com/jail-saved-my-life/e.

29. *See e.g.*, James Forman Jr., What Happened When America Emptied Its Youth Prisons: Lesson from a radical 20-year experiment and quiet triumph of public policy, N.Y. TIMES, https://www.nytimes.com/2025/01/28/magazine/juvenile-prison-crime-rates.html (last updated Feb. 21, 2025).

30. *Id*.

31. Charles E. Loeffler & Daniel S. Nagin, The Impact of Incarceration on Recidivism, 5 ANN. REV. OF CRIM. 133, 147–49 (Jan. 2022).

Why does it matter that the criminal legal system is a highly complex, wicked problem? It matters because wicked problems require not only different analysis to understand the problems themselves, but they also demand a different approach to have any hope of making meaningful change. Wicked problems require "adaptive" approaches.[32] This means that more time should be spent to better understand and analyze the situation.[33] This should include looking at possible negative impacts and making sure there is an understanding of any already existing changes.[34]

For example, one problem in the criminal legal system is pre-trial incarceration. This is a problem for a variety of reasons, including that poor jail conditions increase the coercive atmosphere of plea bargaining,[35] and that defendants in custody may get worse outcomes on their cases than those who are out of custody.[36] One proposed change has been bail reform so that more people are released pre-trial.[37] One concern is that if people are released pre-trial it may increase the number of defendants who fail to appear at future court proceedings. Taking a more adaptive approach could include making sure that all of the players in the system (police, probation, pretrial services, jails, prosecutors, defense lawyers and judges) are involved in examining how the system currently works and determining what may need to be done. This could include considering how to better implement existing bail laws. It could also include determining what is lacking so proposals could come from the players in the system for specific changes in the law to decrease the number of people held in custody while not increasing failures to appear and addressing safety concerns.

As will be discussed, dispute resolution processes are a common and routine feature of the criminal legal system. However, few of these processes have been adopted through an adaptive process that recognizes that the criminal legal system is a wicked problem and applies that analysis to examining the current conditions and reform. The criminal legal system demands broad systemic approaches—recognizing that it is a cloud and not a clock. As will be discussed, this systemic failure has limited the impact—and the promise—of each of these processes.

---

32. Chrustie, *supra* note 15, at 451.

33. Coleman & Ricigliano, *supra* note 10, at 480.

34. *Id*.

35. *See e.g.*, Kate Brumback, Justice Department says jail conditions in Georgia's Fulton County Violate Detainee Rights, AP (Nov. 14, 2024), https://apnews.com/article/justice-department-fulton-county-jail-investigation-c6c8e088d7e8aee58e6420cac15d7b49; Larry Neumeister et al., Judge Finds New York City in Contempt Over Jail Conditions, moves closer to a federal takeover, AP (November 27, 2024), https://apnews.com/article/rikers-island-jail-reform-contempt-reform-nyc-57d73548e61a28675e80ac0a2d927064; *see generally* "Not in it for Justice" How California's Pretrial Detention and Bail System Unfairly Punishes Poor People, HUMAN RIGHTS WATCH (April 11, 2017), https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

36. Paul Heaton et al., The Downstream Consequences of Misdemeanor Pretrial Detention, 69 STAN. L. REV. 711, 715–16 (2017).

37. For an example of recent bail reform see New York's Bail Elimination Act of 2019, entered into force January 2020. *See e.g.,* S. 2101-A, 2020 Leg., Reg. Sess. (N.Y. 2020), https://legislation.nysenate.gov/pdf/bills/2019/s2101a.

III. PLEA BARGAINING

Plea bargaining is the dominant process for resolving criminal cases in the United States.[38] It has existed since colonial times and became the dominant process by at least the 1960s and now over 90% of criminal convictions are due to plea bargaining.[39] It is also the entry point for other alternative processes.[40] As will be discussed later, it is due to plea bargaining that problem solving courts have developed as they have in the United States.[41] Plea bargaining allows for flexibility and innovation within the criminal legal system.[42] However, there are serious concerns with how plea bargaining works in practice. I will begin by providing an overview of plea bargaining, including its background and how it functions. Next, I will explore the primary criticisms associated with plea bargaining. Following that, I will examine efforts aimed at reforming the practice. Finally, I will discuss how plea bargaining has the potential to drive meaningful reform in the criminal legal system.

A. Background

Plea bargaining is a form of negotiation and could include charge bargaining, sentence bargaining, or a sentence recommendation agreement.[43] Under charge bargaining, the prosecutor may agree to dismiss some of the charges or reduce the charge. For example, a prosecutor could offer a defendant charged with three counts of possession for sale of a controlled substance a plea deal that includes dismissing all three counts and having the defendant plead guilty to one count of simple possession of a controlled substance, a reduced charge. In a sentence bargain the prosecutor would offer a certain amount of time, for example, if the defendant plead guilty to the simple possession charge, they would get probation and six months in jail, or time served in jail. Finally, under a sentence recommendation agreement, a type of plea bargaining that is more common in the federal system, a prosecutor would recommend that the defendant be sentenced to a certain amount of time if they plead guilty. It would be up to the judge to decide what sentence to impose. Although plea bargaining is the dominant process for criminal convictions, criminal defendants do not have a right to a plea deal.[44] It is entirely within the prosecutor's discretionary power whether to make an offer or not.[45]

The criminal laws in all fifty states, and federally, have been rewritten to give prosecutors more power.[46] For example, prosecutors can decide whether to charge

38. *See e.g.*, Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

39. *Id.*

40. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEAL STUD. 459, 460 (2004) (discussing the low trails rates in criminal cases from 1962-2002).

41. *See infra* Section III.

42. Cynthia Alkon, The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler & Frye, 41 HASTINGS CONST. L. Q. 561, 567 (Spring 2014) [hereinafter "The U.S. Supreme Court's Failure to Fix Plea Bargaining"].

43. *See e.g., id.*

44. *Id.*

45. *Id.*

46. Stephanos Bibas, Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection, 99 CAL. L. REV. 1117, 1128 (2011).

essentially the same act as a misdemeanor or a felony.[47] Prosecutors also have the discretion to decide whether to file enhancements that can significantly increase the criminal penalty, for example, the use of a gun, including simply having a gun present during the commission of a crime, can add a mandatory ten years in prison to the underlying offense.[48] In addition, prosecutors can decide to file one felony charge, or several felony charges for the same act.[49]

How do prosecutors wield this power? Consider a fact scenario where a defendant has a gun and waves it at a person while saying "I will shoot you!" A prosecutor could decide to file that case as a simple misdemeanor brandishing of a weapon.[50] In some states this charge carries a minimum penalty of thirty days in jail.[51] The prosecutor could also decide to charge this as a criminal threat.[52] In some states, like California, this could be filed as a misdemeanor, with no minimum time, or a felony with up to three years in prison.[53] The prosecutor could decide to add a gun use allegation, on top of the criminal threat charge, and , in some states, this could add an additional ten years in prison.[54] The prosecutor could also decide to charge the case as an assault, or, depending on the overall circumstances, as an attempted murder (what was the context of "I will shoot you"? Was it with an intent to kill? Is waiving the gun a sufficient act for an attempt?). What if there was more than one person present when the gun was shown? The prosecutor could decide to file a charge of criminal threat for each person present and, depending on the law in the individual state, if convicted, the penalty for each charge could run consecutively, including the gun use enhancement.

As I have discussed elsewhere, plea bargaining is a multi-party negotiation.[55] There is a negotiation between the defense lawyer and the prosecutor. The defendant also needs to agree to the deal and defense lawyers often look at that conversation as another negotiation.[56] Finally, for the plea deal to go through, the judge needs to agree to accept it.

There is no single approach to plea bargaining. The negotiation could be long and extended or involve very little (or no) counteroffers or discussion.[57] Often prosecutors will make the first offer in a case as part of the electronic discovery given to defense lawyers.[58] In practice this means that the first offer has been made before

47. Cynthia Alkon, Hard Bargaining in Plea Bargaining: When do Prosecutors Cross the Line? 17 NEV. L. J. 401, 409 (Spring 2017) [hereinafter Hard Bargaining in Plea Bargaining"].

48. *See e.g.*, FLA STAT. §775.087 (2) (2016).

49. *See e.g.*, Note, Stacked: Where Criminal Charge Stacking Happens—and Where it Doesn't, 136 HARV. L. REV. 1390, 1391 (March 2023) (discussing stacking, when "prosecutors charge overlapping and duplicative offenses to build pressure against criminal defendants when fewer charges would suffice and more accurately capture defendants' culpability.").

50. CAL. PENAL CODE § 417(a)(2).

51. *Id*.

52. CAL. PENAL CODE § 422.

53. *Id*.

54. *See, e.g.*, CAL. PENAL CODE § 12022.53(b).

55. Cynthia Alkon, The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland, 38 NYU REV. OF L. & SOC. CHANGE 407, 413–14 (2014).

56. *Id*.; JILL PAPERNO, REPRESENTING THE ACCUSED: A PRACTICAL GUIDE TO CRIMINAL DEFENSE, 226–30 (discussing how to discuss plea offers with clients and how to persuade, a negotiation skill).

57. The U.S. Supreme Court's Failure to Fix Plea Bargaining, *supra* note 42, 404–06.

58. *See e.g.*, DOUGLAS W. MAYNARD, INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION 104 (1984) (discussing the difference between routine and non-routine plea bargaining. In routine

the defense attorney has seen any of the information about the case, and likely before they have even spoken to their client. Defendants may take the first plea offer without any counter-offer by their lawyer. This can happen for a variety of reasons including that the offer is the "standard offer" for this type of case, or because the defendant is in custody and the offer is a "time-served" offer so the defendant will be released after entering their guilty plea. There are also times when the defense lawyer should make a counter-offer (or, if possible the first offer) and they fail to do so due to case load pressures[59] or lack experience or training in how to negotiate.[60]

There are few actual rules regarding how plea bargaining works. No states regulate the negotiation process in plea bargaining. Instead, there are laws specifying what the judge needs to explain to a defendant, and what rights a defendant must agree to give up on the record and in court, as part of the plea colloquy when pleading guilty (or no contest).[61]

There are few constraints on prosecutorial behavior. Prosecutors can threaten to add charges and enhancements if a defendant rejects a plea deal. Prosecutors can also threaten to add the death penalty if the defendant rejects the plea deal and there is a factual basis for doing so.[62] One of the few limits is that the U.S. Supreme Court has held that prosecutors are not allowed to withdraw a plea offer once it has been accepted.[63] There are also few rules regarding what defense lawyers should do in plea bargaining. The U.S. Supreme Court has only looked at the counseling phase of plea bargaining and held that defense lawyers are obligated to advise their clients if an offer has been made,[64] advise their clients accurately about the applicable law,[65] and to advise their clients of any immigration consequences if they accept the plea offer.[66]

Plea bargaining has several distinct advantages. First, it allows for cases to be resolved more quickly than going to trial.[67] Second, like with other forms of dispute resolution, it can give the parties more control over the case outcome than they might have if their case went to trial.[68] Finally, and most importantly for this discussion, as I have observed before, plea bargaining allows for creativity in the process and case outcomes.[69] As will be discussed below, it is due to plea bargaining that the criminal legal system can innovate and that new processes, such as problem solving courts, can start. The informal nature of plea bargaining allows for any case

---

plea bargaining, the prosecution and defense "do not really negotiate" but that "still reflects strategic and systematic negotiational efforts.").

59. The U.S. Supreme Court's Failure to Fix Plea Bargaining, *supra* note 42, 394.

60. *See, e.g.*, Jenny Roberts & Ronald F. Wright, Training for Bargaining, 57 WM. & MARY L. REV. 1445 (2016).

61. *See, e.g.*, FED. R. CRIM. P. 11(b).

62. Brady v. United States, 397 U.S. 742, 755 (1970).

63. Santobello v. New York, 404 U.S. 257, 262–ß63 (1971).

64. Missouri v. Frye, 566 U.S. 134 (2012); see e.g., CAL. R. PROF. CONDUCT 1.4.1(a)(2) (stating both civil and criminal lawyers are obligated to convey all offers, an obligation that was not established in 2012 with the Frye case).

65. Lafler v. Cooper, 566 U.S. 156 (2012).

66. Padilla v. Kentucky, 559 U.S. 356 (2010).

67. The U.S. Supreme Court's Failure to Fix Plea Bargaining, *supra* note 42, at 589–90.

68. Carrie Menkel-Meadow, When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals, 44 UCLA L. REV. 1871, 1872 (Aug. 1997).

69 The U.S. Supreme Court's Failure to Fix Plea Bargaining, *supra* note 42, at 591–94.

outcome, or process, if it is not a violation of the law and the defendant, lawyers, and judge agree to it.

Importantly, players in the system (judges and lawyers) both expect and rely on this form of negotiation to resolve cases, and they tend to look at trial as the exception. This has created a culture where the players in the criminal legal system are both comfortable with and expect informal negotiation to be the dominant form of case resolution.

B. Criticism

Plea bargaining has long been the subject of intense criticism, including by this author.[70] There are five basic concerns about the process itself.[71] First, plea bargaining is overly coercive.[72] Second, there can be a trial penalty for defendants who do not take the plea deal. Third is the concern about disparate treatment of defendants, including that innocent defendants are pleading guilty. Fourth is the extraordinary power that prosecutors have and can misuse in the plea bargaining process. Finally, the heavy use of plea bargaining is preventing the development of better lawyering skills by both prosecutors and defense lawyers. This section will discuss each of these in turn.

The criticism that plea bargaining is overly coercive dates back decades. In 1978, John Langbein, in his classic article, compared plea bargaining to torture.[73] Langbein compared plea bargaining to medieval European criminal procedure and concluded that both are not adjudicatory, but instead "concessionary" relying on the defendant confessing guilt.[74] For less serious cases, defendants may face the choice between pleading guilty and getting released from jail or trying to fight their case and remaining in jail for months pending trial. In addition, criminal punishments can be severe, leading defendants to feel that pleading guilty is their only viable option.[75] The concern about coercion is related to the possible criminal penalties and to what is often referred to as the "trial penalty."

In more serious cases, defendants face the prospect of a trial penalty—getting a worse sentence if they go to trial and lose than if they had taken the plea offer.[76] Studies have found that defendants get sentences that are four times higher after trial then the plea deals.[77] However, these studies likely underestimate the trial penalty as they are comparing sentences for the same offenses and not considering the impact of sentence bargaining. In addition, as was discussed above, prosecutors can threaten to add enhancements and charges that can dramatically increase the

70. CYNTHIA ALKON & ANDREA SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT 129–62 (2019).

71. *Id.*

72. John Langbein, Torture and Plea Bargaining, 46 U. CHI. L. REV. 8, 12–15, 17–18 (1978).

73. *Id*.

74. *Id*. at 12.

75. ALKON & SCHNEIDER, *supra* note 70, at 133–38.

76. *See* Nancy J. King et al., When Process Affects Punishment: Differences in Sentences After Guilty Pleas, Bench Trial, and Jury Trial in Five Guidelines States, 105 COLUM. L. REV. 956, 992 (2005) (reporting trial penalties ranging from 13% to 461%, depending on the state and the offense).

77. *Id*.; *see also*, Andrew Chongseh Kim, Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty, 84 MISS. L. J. 1195, 1202 (2015); Ben Grunwald, Distinguishing Plea Discounts and Trial Penalties, 37 GA. ST. U. L. REV. 261 (2021).

potential penalty.[78] These are not empty threats, although it is hard to know how often this happens. However, the possibility of additional enhancements and charges could impact the accuracy of the calculation of the trial penalty. These studies also do not seem to include misdemeanor cases, which are less susceptible to a heavy trial penalty due to the overall lower sentence range.[79] The trial penalty, however, could contribute to innocent defendants deciding to plead guilty.[80]

Due to both the Innocence Project and the Exoneration Database, it is clear that innocent people have plead guilty to criminal cases, and to very serious criminal cases.[81] Innocent defendants may be even more risk averse, and accept a guilty plea due to their fear about the consequences if they are convicted.[82] The likelihood that an innocent person would accept a deal may increase when they have fewer resources to fight their case.[83] Related to the concern that innocent people plead guilty is the concern that defendants are treated inconsistently. As was discussed above, there can be vast differences in how prosecutors charge the same acts. There are also differences in plea offers for similarly situated defendants. These differences can be more acute if the defendant comes from a less advantaged part of society, including if they are poor and/or a person of color. The basic concern is that prosecutors can be biased in the plea bargaining process, both implicitly and explicitly. This bias can influence their decision making regarding when they file charges and make plea offers.[84] One way to address this concern is to lessen the power that prosecutors have in the plea bargaining process.

As was discussed above, criminal codes have been rewritten to give prosecutors more power in charging decisions. Prosecutors also have absolute power to decide whether to make a plea offer and what that offer is. Critics are concerned that since defendants often feel that they cannot fight their case without risking a much more serious punishment, they are often faced with having to accept even a bad deal offered by a prosecutor.[85] In the absence of rules that limit how prosecutors wield

78. *See* discussion *supra* text and footnotes 71–76.

79. *But see* The New York State Trial Penalty: The Constitutional Right Under Attack, NACDL 15, 18, 59 (2021) (A study conducted by the National Association of Criminal Defense Lawyers in New York that included survey data and examined 79 cases for the trial penalty. Ninety-three percent of survey respondents reported that the trial penalty was more common in felonies than in misdemeanors. Overall, the study noted that in 2019 there were only 388 misdemeanor trials in New York City. The finding that those who go to trial on misdemeanors suffer a trial penalty reinforced an earlier study reported in Besiki L. Kutateladze & Victoria Z. Lawson, Is a Plea Really a Bargain? An Analysis of Plea and Trial Dispositions in New York City, 64 CRIME & DELINQ. 856 (2018) (finding higher fines and longer sentence times for those that went to trial)).

80. ALKON & SCHNEIDER, *supra* note 70, at 135–43.

81. Research Resources, THE INNOCENCE PROJECT, https://innocenceproject.org/research-resources/ (last visited May 6, 2025) (eleven percent of exonerees pleaded guilty); Exonerations in 2015, NAT'L REGISTRY OF EXONERATIONS (Feb. 3, 2016), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/Exonerations_in_2015.pdf (of 148 exonerations in 2015, forty-four percent had plead guilty).

82. Lucian E. Dervan & Vanessa A. Edkins, The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem, 103 J. CRIM. L. & CRIMINOLOGY 1, 3–4 (2013) (finding, based on an experiment, that innocent people will take a plea deal due to fear of the consequences if they reject the deal).

83. Jed S. Rakoff, Why Innocent People Plead Guilty, N.Y. REV. (Nov. 20, 2014) https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?lp_txn_id=1619014.

84. For a discussion of how to decrease bias in the plea bargaining process *see* Cynthia Alkon, Bargaining Without Bias,73 RUTGERS U. L. REV. 1337 (2021) (recommending structural and individual fixes to decrease prosecutorial bias in plea bargaining).

85. *See e.g.,* ALKON & SCHNEIDER, *supra* note 70, at 133–38.

their power, or changes in law to decrease the discretionary power of prosecutors, there is little incentive for prosecutors to change. Although some prosecutors' offices have suggested changes in their approach as part of a larger reform agenda.[86]

The final criticism is that lawyering skills have suffered due to plea bargaining.[87] For the purposes of this discussion, one key concern is that because prosecutors often do relatively few trials, they may not evaluate the strengths and weaknesses of their cases as accurately.[88] Jury trials can be the ultimate test of the strength of a case. Prosecutors who do fewer trials may not be as attuned to their witnesses and how well they may hold up on the witness stand. They may tend to take things at face value that may not stand up at trial. This can mean that prosecutors think their cases are stronger than they are. Defense lawyers can also suffer from not having enough trial experience and encourage their clients to take deals on cases that are not as strong as they might think they are, due to their lack of testing evidence in trial.[89]

C. Reform Efforts

Due to the criticism of plea bargaining, there have been numerous efforts to reform the process. There have been three main types of reform efforts over the years.[90] First, there have been recommendations to change the criminal law.[91] Second, there have been calls for changes in the process of plea bargaining itself.[92] Third, there have been calls to change how the players operate within plea bargaining.[93] Despite repeated and sustained calls for reform, plea bargaining, and the criminal legal system itself, has been highly resistant to change. One issue is that the efforts to reform plea bargaining often look at plea bargaining as a stand-alone process and fail to consider that it is deeply embedded into the criminal legal system. Related to this is the failure to recognize that plea bargaining in and of itself is a wicked problem that demands a more comprehensive and adaptive approach for any meaningful change to take hold. This failure is part of the reason that plea bargaining has not had the wider impact that it could have.

The recommendations to change the law have recognized that one of the reasons that plea bargaining can be so coercive towards criminal defendants is because the criminal law gives prosecutors extraordinary power which can be wielded to coerce guilty pleas. One suggestion has been to reduce the number of acts where the prosecutor has wide discretion to charge the case as either a felony or a misdemeanor.[94] Another suggested area for reform has been to revise criminal laws so

86. *See e.g.,* New Policies, PHILA. DAO (Feb. 15, 2018) https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf (describing new charging and plea bargaining policies after Larry Krasner took office).

87. Robert J. Conrad Jr. & Katy L. Clements, The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges, 86 GEO. WASH. L. REV. 99, 159–61 (Jan. 2018).

88. *Id*. at 160.

89. *Id*.

90. ALKON & SCHNEIDER, *supra* note 70, at 163–91.

91. *Id*. at 164–70.

92. *Id*. at 170–81.

93. *Id*. at 181–95.

94. Cynthis Alkon, An Overlooked Key to Reversing Mass Incarceration: Reforming the Law to Reduce Prosecutorial Power in Plea Bargaining, 15 UNIV. OF MD. L. J. RACE RELIGION, GENDER & CLASS 192, 203–05 (2015).

that prosecutors cannot easily use the threat of more serious charges or enhancements to ratchet up the possible sentence and thereby increase the coercive atmosphere of plea bargaining.[95]

Bail reform is another proposed reform that could decrease the coercive atmosphere of plea bargaining. It is well established that defendants in custody end up with worse deals then those who are out of custody at the time of their guilty plea, particularly with less serious cases.[96] In addition, defendants who are out of custody are less swayed by a "time served" offer than a defendant who is in custody. Especially those with bail set at an amount they won't be able to pay and who can only get out of custody immediately if they plead guilty and take the offered plea bargain.[97] Defendants have little leverage in these circumstances, and there are serious concerns that innocent defendants may be pulled into pleading guilty to get out of jail. Decreasing the number of defendants who are jail when deciding whether to take a plea offer or not could decrease the overall coercive atmosphere of the process.

Another reform that critics have focused on is to change the process of plea bargaining.[98] This broad category includes calls for regulations of the plea bargaining process itself, and changing the role of defendants and increasing the number of trials through banning plea bargaining.[99] Critics recommend that the plea bargaining process change so that defendants have a better understanding of what they are doing and are not rushed in the process.[100] For example, defendants could be allowed a cooling off period, as often happens in the consumer context, to allow a defendant to easily withdraw a guilty plea within a specified time period if they change their mind.[101] Professor Michael O'Hear has suggested that how defendants interact with the court and lawyers during the plea bargaining process should change to incorporate procedural justice.[102] This should include "ensur[ing] that defendants have had a meaningful opportunity to tell their side of the story," and that there should be an explanation of any positions during the negotiation itself to "expressly acknowledge arguments for more lenient treatment."[103] Finally, there have also been efforts to ban plea bargaining.[104] These efforts have not succeeded, in large part, because they were imposed on some or all of the players, and they were not part of an inclusive process to arrive at agreement to change what process would be used to resolve cases.

---

95. *See generally* Hard Bargaining in Plea Bargaining, *supra* note 47 (discussing how prosecutors can use hard bargaining tactics in plea bargaining and recommending reforms to prevent this practice).

96. Heaton, *supra* note 36, at 715–16 (analyzing data from Harris County Texas and concluding that "pretrial detention casually increases the likelihood of conviction, the likelihood of receiving a carceral sentence, the length of a carceral sentence, and the likelihood of future arrest for new crimes").

97. *See e.g.*, John Raphling, Op-Ed: Plead guilty, go home. Plead not guilty, stay in jail, L.A.TIMES (May 17, 2017), https://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html.

98. ALKON & SCHNEIDER, *supra* note 70, at 170.

99. *Id.* at 170–81.

100. Bibas, *supra* note 46, at 1154–55 (2011).

101. *Id*. at 155.

102. Michael O'Hear, Plea Bargaining and Procedural Justice, 42 GA. L. REV. 407, 420–22 (2008).

103. *Id*. at 431.

104. ALKON & SCHNEIDER, *supra* note 70, at 176–79; Roland Acevedo, Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study, 64 FORDHAM L. REV. 987, 999–1000, 1005–07, 1013 (1995).

The final broad category is that critics have called for changes in how the players operate within plea bargaining.[105] These suggestions have included limiting prosecutorial behavior so they cannot engage in hard bargaining tactics, such as exploding offers,[106] and improving how prosecutors screen cases when they are deciding whether to file criminal charges and which charges to file.[107] Finally, some critics have called for judges to be more involved in the negotiation process.[108]

Despite these efforts, significant barriers to reform remain. Prosecutors, judges, and defense lawyers are often highly resistant to changes that could disrupt caseload management. Legislators can be reluctant to decrease penalties for crimes or remove options to charge the same act as a felony or misdemeanor. Perceptions that crime rates are increasing across the board, or concerns about increased murder rates, contribute to a political environment where it is difficult to advocate for decreased penalties.[109]

D. Contributing to Change?

Despite its challenges and widespread criticisms, plea bargaining remains the single most important process within the criminal legal system—one that has facilitated innovation and which holds the potential to bring about deeper, more transformative change. The criminal legal process is highly adversarial during certain processes like trials and pre-trial motions. However, the dominant use of plea bargaining, a highly informal process, means that every player in the system is accustomed to regularly using an informal process that may be less adversarial and more cooperative.[110] Due to plea bargaining, the players in the system understand through experience that if everyone agrees, (the judges, prosecutors, defense lawyers, and defendants), and if the proposed plea deal or process does not violate the law, it is possible to innovate and try new things. No one is constrained by what is already enshrined in law.

As will be discussed in the next section, this culture of flexibility and informality is how problem-solving courts, including drug courts, were able to start without any laws or legal framework. All it took was an agreement to try something new. Although the players in the system rarely look at it this way, plea bargaining is, in fact, a conduit for innovation and flexibility that can contribute to meaningful change to focus the criminal legal system on justice and rehabilitation and away

105. ALKON & SCHNEIDER, *supra* note 70, at 181–95.

106. Hard Bargaining in Plea Bargaining, *supra* note 47, at 406–07.

107. Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 STAN. L. REV. 29, 34, 58–68 (2002).

108. *See generally* Nancy J. King & Ronald F. Wright, The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations, 95 TEX. L. REV. 325 (2016) (discussing the increased role that judges are taking in plea bargaining, a process they term "managerial judging").

109. Jeanine Santucci, A new wave of 'tough-on-crime' laws aim to intimidate criminals. Experts are skeptical., USA TODAY (Mar. 14, 2024), https://www.usatoday.com/story/news/nation/2024/03/14/new-wave-of-tough-on-crime-laws/72955845007/.

110. *See generally* Andrea Kupfer Schneider, Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style, 7 MARQ. L. REV. 143 (2002) (finding that criminal lawyers had the highest number of true problem solvers); Andrea Kupfer Schneider, Cooperating or Caving in: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?, 91 MARQ. L. REV. 145 (2007) (reporting the results from criminal lawyers in a survey about negotiation styles and the attitudes of criminal lawyers towards negotiation).

from the more simplistic retributive approaches. It is limited when plea bargaining has been used towards these ends, and even rarer when the players in the system view plea bargaining in this light. But because of its flexibility, there is tremendous potential for greater reforms through the plea bargaining process. However, this potential will likely remain limited and largely unrealized as long as plea bargaining is considered a stand-alone process disconnected from the overall criminal legal system. Far reaching reform is more likely to be achieved if reformers considered plea bargaining as part of larger systemic reforms, recognizing its complexity while using an adaptive process that would include the various players both to understand the impact of change and to ensure agreement so the changes would be implemented.

IV. PROBLEM SOLVING COURTS

Problem-solving courts started with the first drug court in Dade County, Florida, in 1989.[111] There are now over 4,000 drug courts in the United States.[112] After the first drug court, other types of problem-solving courts started including mental health courts and veterans courts.[113] These courts tended to start because a judge decided they wanted to do things differently—that they didn't like the limited role and constrained approaches in traditional criminal courts.[114] These courts represent a significant innovation within the criminal legal system by offering an alternative to traditional adjudication for certain types of offenses and certain defendants. These courts focus on rehabilitation, not punishment, and strive to address the underlying issues of criminal behavior, including substance abuse and mental illness.[115] For the purposes of this discussion, problem solving courts are an example of innovation that is possible due to the plea bargaining culture, where players in the system understand that all that is needed to try something new is agreement by the players (judges, prosecutors, defense lawyers, and defendants) and to make sure

111. *See e.g.*, 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, 481 (1999).

112. What are Drug Courts?, NAT'L TREATMENT CT. RES. CTR., https://ntcrc.org/what-are-drug-courts/ (last visited May 6, 2025).

113. *See* Treatment Courts Across the United States, NAT'L DRUG CT. RES. CTR. 5, https://ntcrc.org/wp-content/uploads/2021/08/2020_NDCRC_TreatmentCourt_Count_Table_v8.pdf (last visited May 6, 2025).

114. JAMES NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 37 (Princeton Univ. Press 2009); Have Problem Solving Courts Changed the Practice of Law?, *supra* note 9, at 605.

115. *See e.g.*, Defining Drug Courts: The Key Components, U.S. DEP'T OF JUST. (Jan. 1997) https://www.ojp.gov/pdffiles1/bja/205621.pdf (There are ten "key components" that have been identified for drug courts and are used in other problem-solving courts. These components are: 1) Courts integrate alcohol and other drug treatment services with legal system case processing; 2) Using a non-adversarial approach; prosecution and defense counsel promote public safety while protecting participants' due process rights; 3) Eligible participants are identified early and promptly placed in the alternative court program; 4) Courts provide access to a continuum of alcohol, drug and other related treatment and rehabilitation services; 5) Abstinence is monitored by frequent alcohol and other drug testing; 6) A coordinated strategy governs court responses to participants' compliance; 7) Ongoing judicial interaction with each court participant is essential; 8) Monitoring and evaluation measure the achievement of program goals and gauge effectiveness; 9) Continuing interdisciplinary education promotes effective planning, implementation, and operations; 10) Forging partnerships among courts, public agencies, and community-based organizations generates local support and enhances effectiveness).

that the law is not violated through the innovation. The players just need to agree, and the agreement cannot explicitly violate existing laws. Like plea bargaining, there are no laws that outline how drug courts should work. This process, like plea bargaining, happens largely without regulation and outside the formal legal process.

A. Background

The first drug court, established in Dade County, Florida, in 1989, was a response to the growing recognition that addiction-driven crime could not be effectively addressed through incarceration alone. In what became the typical model, a judge proposed the change in process and got agreement from prosecutors and defense lawyers to adopt the new process.[116] The first drug court sparked the growth of an entire category of courts, often called problem solving courts, therapeutic justice, or specialty courts. What these courts have in common is that they follow the same basic model of combining judicial oversight with treatment programs, intended to give participants a structured path to recovery. Courts often require the defendant to plead guilty before they can participate in the problem-solving court.[117] Since the defendant is already convicted, the possible sentence for the underlying crime acts as a source of encouragement, or pressure, for the defendant to comply with the problem-solving court requirements. Success is monitored through regular court appearances, drug testing, and compliance with treatment plans.[118] Unlike in most adversarial court proceedings, the dominant players in the courtroom are not the lawyers, but the judge. Problem solving courts can often be identified by the active interaction that the judge has with the participants while the lawyers speak far less frequently.

The problem-solving court model has since expanded to address a variety of issues. Mental health courts focus on diverting individuals with mental illness into treatment rather than jail.[119] Veterans courts provide support for former service members dealing with challenges such as PTSD and substance abuse.[120] Other specialized courts, such as Driving under the Influence ("DUI")/While Intoxicated ("DWI") Courts[121] and Family Treatment Courts,[122] aim to provide tailored interventions that address unique features of these offenses and defendants who commit these offenses.

---

116. JAMES L. NOLAN JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 35 (Paul DiMaggio et al. eds., Princeton Univ. Press 2001). Associate Chief Judge Herbert Klien on the Eleventh Circuit of Florida was asked to do a study on the increasing number of felony drug cases and look at alternative approaches and drug court was his recommendation. *Id*.

117. America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform, NAT'L ASS'N OF CRIM. DEF. LAWS 11, https://www.nacdl.org/getattachment/d15251f8-6dfe-4dd1-9f36-065e3224be4f/americas-problem-solving-courts-the-criminal-costs-of-treatment-and-the-case-for-reform.pdf (last visited May 6, 2025).

118. *See e.g.*, Milwaukee County Drug Treatment Court Policy and Procedure Handbook, MILWAUKEE CNTY 14–20, https://county.milwaukee.gov/files/county/courts/Chief-Judge/Drug-Treatment/DrugTreatmentCourtPoliciesandProcedures.pdf (last visited May 6, 2025) (detailing requirements at each stage).

119. KRISTEN DEVALL ET AL., *supra* note 8, at 33–35.

120. *Id.* at 33–36.

121. *Id.*

122. *Id.* at 33–37.

B. Criticism

Despite their promise, problem-solving courts face serious criticism. One concern that the courts are not grounded in best practices to treat serious medical conditions such as substance abuse and mental illness.[123] Critics call for treatment to be directed exclusively by doctors and health care professionals.[124] They criticize judges and lawyers, who lack expertise and knowledge, being in charge of medical treatment and that some fail to use accepted standards of care, such as methadone treatment.[125]

Another concern is that relatively few defendants are able to participate in these courts.[126] This can be for two reasons. First, the admission criteria may be overly restrictive, preventing defendants with prior offenses, or current offenses in certain categories, such as violent crimes from being admitted, even if they would benefit from rehabilitative programs.[127] Second, these courts restrict the absolute number of participants regardless of whether they would otherwise qualify.[128] The size restrictions are because these courts require more resources both in terms of personnel and court time limiting the number of people each court can realistically accommodate. A related criticism is that the restrictive criteria and limited focus of these courts can disproportionately impact people of color who are disproportionately represented in the criminal legal system.[129]

---

123. *See* Richard C. Boldt, Problem-Solving Courts and Pragmatism, 73 MD. L. REV. 1120, 1125 (2014) (Problem-solving courts have not been "shaped most prominently. . .by a foundational theoretical perspective but by an essentially pragmatic set of instincts."); see also Christine Mehta, Neither Justice Nor Treatment: Drug Courts in the United States, PHYSICIANS FOR HUMAN RTS. (Jun. 15, 2017), https://phr.org/our-work/resources/niether-justice-nor-treatment/ ("Drug courts in the United States routinely fail to provide adequate, medically-sound treatment for substance use disorders, with treatment plans that are at times designed and facilitated by individuals with little to no medical training.").

124. *See* Marianne Møllman, Neither Justice Nor Treatment: Drug Courts in the United States, PHYSICIANS FOR HUMAN RTS. 3 (Jun. 2017), https://phr.org/wp-content/uploads/2017/06/phr_drugcourts_report_singlepages.pdf.

125. *See* Mehta, *supra* note 123 (What's more, some drug courts require total abstinence from substance use, including prescribed medications, and refuse to allow medication-assisted treatment, despite the fact that treatment for opioid use disorder often requires long-term medication. Such approaches are counterproductive and unsupported by evidence."); Maia Szalavitz, Every Drug Court Should Allow Methadone Treatment, N.Y. TIMES (Jul. 20, 2015), https://www.nytimes.com/2015/07/20/opinion/every-drug-court-should-allow-methadone-treatment.htm; Claudia Lauer, Feds Sue Pennsylvania Court System Over Bans on Opiod Meds, AP (Feb. 25, 2022), https://apnews.com/article/pennsylvania-lawsuits-philadelphia-opioids-us-department-of-justice-17377a1fc16c1413b2886ce857206323.

126. Have Problem Solving Courts Changed the Practice of Law?, *supra* note 9, at 601; *see generally* Erin R. Collins, Status Courts, 105 GEO. L. J. 1481, 1484 (2017) (arguing that problem solving courts view only defendants with a particular "status" as being so unique that they should be treated differently preventing a much larger group of defendants who could benefit from treatment from getting treatment through these courts).

127. *See* Natassia Walsh, Addicted to Courts: How a Growing Dependence on Drug Courts Impacts People and Communities, JUST. POL'Y INST. 16 (Mar. 2011), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/addicted_to_courts_final.pdf.

128. *See* Norman L. Reimer, Inside NACDL: Addicted to a Flawed Solution: Drug Courts Revisited, NAT'L ASS'N OF CRIM. DEF. LAWS. (Apr. 2011), https://www.nacdl.org/Article/April2011-InsideNACDLAddictedtoaFlawedSo (referring to the total number of people entering drug courts: "This number represents only a tiny and select percentage of drug defendants").

129. Walsh, *supra* note 127, at 21; but see Timothy Ho et al., Racial and Gender Disparities in Treatment Court, Do They Exist and Is There Anything We Can Do to Change Them?, 1 J. FOR ADVANCING JUST. 5, 27 (2018) (finding that African Americans were "representative relative to the local probation population").

Another concern is that the way these courts work in practice can vary widely. There may be different resources in terms of treatment or other types of assistance available in different communities. The process for admission into these courts can also vary in terms of who is eligible. For example, many veterans courts require defendants to have an honorable discharge to qualify. However, this excludes those —who received a less than honorable discharge who could benefit from the veterans court approach—especially when their military service is a cause of criminal behavior (due to PTSD and other mental illnesses contracted during military service).[130] What is required for completion may also vary widely, with some having more requirements and taking longer to complete.

There are also differences in terms of the criminal process itself within these courts. Many courts require defendants to plead guilty before they can be admitted. Some of these courts will then allow the plea to be withdrawn and the case dismissed. Others allow the conviction to stand even after successful completion. Another concern in terms of disparate treatment is that some courts prioritize punitive compliance measures, such as incarceration for minor infractions, over supportive interventions that address underlying issues.

Perhaps the biggest criticism is that problem-solving courts should not be the exception in terms of how criminal defendants are treated. Instead, critics suggest, the entire criminal legal system itself should be structured to focus on providing rehabilitation services to any defendant who could benefit from this kind of help.[131] Critics urge that the problem-solving court approach should be the norm, not reserved as the exception for the lucky few.[132]

C. Contributing to Change?

Despite these challenges, problem-solving courts have demonstrated their potential to contribute to systemic change by changing how defendants are treated and how courts operate. There are five basic differences in problem solving court practices that, if more widely adopted, could make far-reaching changes in the criminal

130. *See* e.g., Aaron S. Gerson, Veterans Resource Guide for the Florida State Court System, FLA. SUP. CT. TASK FORCE ON SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES IN THE CT. SYS. 15 (Aug. 1, 2017), https://www.flcourts.gov/content/download/217060/file/VETERANS_RESOURCE_GUIDE.pdf ("If a veteran received a military discharge other than honorable, they may not receive certain benefits from the Department of Veterans' Affairs and subsequently may not be eligible for veterans court."). In April of 2024 the Veterans Administration changed its policies to allow care for some veterans who did not receive an honorable discharge. This could expand access to Veterans Courts for those who were not honorably discharged but are now eligible for VA benefits. See VA expands access to care and benefits for former service members who did not receive an honorable or general discharge, VA (Apr. 25, 2024), https://news.va.gov/press-room/va-rule-amending-regulations-discharge-determinations/.

131. *See generally* Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use, DRUG POL'Y ALL. (Mar. 2011), https://drugpolicy.org/wp-content/uploads/2023/09/Drug-Courts-Are-Not-the-Answer_Final2.pdf (recommending moving away from Drug Courts and towards better options to treat those with a drug use disorder; Avinash Singh Bhati et al., To Treat or Not to Treat: Evidence on the Prospects of Expanding Treatment to Drug-Involved Offenders, URBAN INST. JUST. POL'Y CTR. (Apr. 2008), https://www.ojp.gov/pdffiles1/nij/grants/222908.pdf (recommending treating all "at risk" for drug dependence arrestees, not just the smaller subset currently in drug courts).

132. *See generally* Erin R. Collins, Beyond Problem-Solving Courts, 25 CARDOZO J. CONFLICT RESOL. 229, 230 (2023) (arguing that problem solving courts should be shut down and a treatment and rehabilitation focus should be the norm across all criminal courts).

legal system.[133] First, defendants are viewed as a whole person and are not simply viewed by the offense they committed.[134] Second, these courts congratulate and celebrate defendants for each success and do not simply focus on violations.[135] Third, there is more of a focus on rehabilitation, not punishment, in terms of how to treat the defendants.[136] Fourth, these courts collect data to demonstrate success in terms of both defendants completing the programs and reduced recidivism.[137] This stands in stark contrast to traditional courts which never have to justify a prison sentence as a "success" or have sentencing practices subjected to scrutiny for their impact on recidivism rates. Finally, the atmosphere in a problem-solving court tends to be fundamentally different from that of traditional courts.[138] Defendants speak and are spoken to in ways that recognize their lives outside of the courtroom. They are asked questions about their families, their jobs, and how they are doing in general. In short, they are treated with kindness in ways that are often lacking in traditional courts.

These changes in approach have an impact on the overall culture of criminal courts. Unlike other reforms, problem-solving courts demand that the players in the system change how they do their jobs, at least in that court. This means that the lawyers and judges in these courts have direct experience with doing things differently. Public defenders, private lawyers, and prosecutors all cycle in and out of these courts. The judges running these courts are no longer only the judges that originally proposed the courts. Problem-solving courts have been around long enough that they are on the second or third generation of judges—which means that judges who might not have been true believers in the problem-solving approach have had to learn a new way of managing their cases and a courtroom. The result is that exposure to the different way these courts manage cases and treat defendants is much wider than the small number of people staffing these courts at any given time. This exposure has the potential to change how the players in criminal courts handle cases that are not sent into a problem-solving court.

To date, problem-solving courts are not an example of a systemic approach to reform or using a more adaptive model for change while recognizing the complexity of the criminal legal system. Problem-solving courts impact too few defendants.[139] And, despite the cultural change that may be happening with the players within the system due to their exposure to these courts, so far, they continue to stand in isolation within the courthouse. Problem-solving courts have not been a catalyst for wider systemic reform. However, they are an example of what is possible when all the players in the system agree to innovate and try new approaches.

IV. RESTORATIVE JUSTICE

Restorative justice ("RJ") is not new, but when used in the modern criminal legal system represents a fundamental rethinking of how crime and harm are addressed. There are a variety of practices that fall under restorative justice. For the

133. Have Problem-Solving Courts Changed the Practice Law?, *supra* note 9, at 617.
134. *Id*. at 618–19.
135. *Id*. at 619.
136. *Id*. at 620–21.
137. *Id*. at 621–23.
138. *Id*. at 623–24.
139. Have Problem-Solving Courts Changed the Practice Law?, *supra* note 9, at 608.

purposes of this article, the discussion is limited to restorative justice processes that are used as a diversion from the criminal legal system or in lieu of the standard criminal process, not post-conviction restorative justice or RJ practices that are entirely outside of the criminal legal system and used, for example in school discipline. A condition precedent to a restorative justice process is that the defendant (or offender) must accept responsibility for the act.[140] Restorative justice is not an adjudicative process to determine guilt.[141] Instead, restorative justice processes focus on identifying and repairing the harm, restoring relationships, and addressing the needs of all stakeholders—victims, offenders, and the community—and then reintegrating the offender back into the community.[142] This section will start with background on how restorative justice processes work, then discuss some of the criticisms of restorative justice processes, and end with a discussion about how restorative justice could improve the criminal legal system.

A. Background

As discussed above, restorative justice focuses on repairing harm and restoring relationships.[143] A condition precedent to a restorative justice process is that the offender must accept responsibility for the acts.[144] Restorative justice processes are not to adjudicate guilt, but rather to determine what is appropriate for the offender to repair the harm. Restorative justice scholars such as Nils Christie advocate for the use of restorative justice as a better approach and to move away from traditional legal processes where the state has "stolen the conflict."[145] For restorative justice proponents, it is important that restorative justice focuses attention on the victims of crimes, what harm they have suffered, and how that harm can be repaired.[146] Punishment is not a goal of restorative justice processes. This does not mean that defendants (or offenders) "get away" with committing a crime, but instead, ideally, they come to an agreement with the victim about how to repair the harm they have done. This can mean paying directly for losses, physically repairing what was broken or harmed (for example, painting over graffiti), and through this process taking responsibility for the harm they caused. As Howard Zehr has said, "Restorative justice is a process to involve, to the extent possible, those who have a stake in the specific offense and to collectively identify and address harms, need, and obligations, in order to heal and put things as right as possible."[147]

Restorative justice is sometimes referred to as "mediation of criminal cases," but it is important to note that there are fundamental differences between a restorative justice process and mediation in the civil context.[148] The first and most

140. Carrie Menkel-Meadow, Restorative Justice: What is it and does it work?, 3 ANN. REV. L. SOC. SCI. 161, 164 (2007) [hereinafter "Restorative Justice: What is it and does it work?"] (One of the "foundational concepts" is the "acknowledgment and acceptance of fault for the wrong committed by the offender with recognition of the harm caused").

141. *Id*.

142. *See e.g.*, HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE, 19–41 (2002).

143. Restorative Justice: What is it and does it work?, *supra* note 140, at 162.

144. *Id*.

145. Nils Christie, Conflicts as Property, 17 BRITISH J. OF CRIMINOLOGY 1, 3–5 (1977).

146. HOWARD ZEHR ET AL., THE BIG BOOK OF RESTORATIVE JUSTICE 50–54 (2015); *see also* Hadar Dancig-Rosenberg & Tali Gal, 34 CARDOZO L. REV. 2313, 2316–18, 2320–21, 2331 (2013).

147. ZEHR, *supra* note 142, at 37.

148. ALKON & SCHNEIDER, *supra* note 70, at 28.

important is that, unlike in civil mediation, both parties are not the same. Unlike in civil cases, one party, the offender, has admitted and accepted responsibility for the act and the RJ process focuses on what the offender will do to repair the harm to the victim. There is no expectation that the victim will repair the harm or that they have any responsibility for what the defendant did.

Commonly used restorative justice processes include victim-offender dialogues, community conferencing, and reparative agreements, which aim to address the needs of all parties involved.[149] In typical restorative justice processes a neutral will act as a facilitator of the conversation between the victim, the offender, and, depending on the process, family members and community members. Restorative justice processes have been used in a variety of contexts, although in the United States they are more commonly used for less serious cases and in the juvenile system.[150]

Studies suggest that RJ can reduce recidivism, improve victim satisfaction, and foster a greater sense of accountability among offenders.[151] Victims often report feeling empowered by the opportunity to articulate the impact of the crime and participate in shaping resolutions, while offenders report gaining a deeper understanding of their actions and are offered a chance to make amends.[152] In contrast to problem solving courts, restorative justice proponents tend to be outsiders to the criminal legal system, rather than players within it.[153] As a result, many RJ programs are operated by non-profits and, in the United States, the RJ process itself is more likely to happen outside the courthouse than within it.[154]

B. Criticism

Critics of restorative justice are concerned about the use of such a fundamentally different process and the impact it can have on both defendants and victims. These concerns include whether defendants and victims are participating voluntarily; the power imbalance in restorative justice processes; due process violations; the

149. *See e.g.*, George Mousourakis, Understanding and Implementing Restorative Justice, 11 TILBURG FOREIGN L. REV. 626, 629–39, 643–44 (2003).

150. Thalia Gonzalez, The State of Restorative Justice in American Criminal Law, 2020 WISC. L. REV. 1147, 1166 (2020) (analyzing restorative justice laws and concluding that there are "far more restorative laws applicable to juveniles than adults.").

151. Marck S. Umbreit et al., Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls, 89 MARQ. L. REV. 251, 269–70, 273–90 (2005); Lindsay Fulham et al., The Effectiveness of Restorative Justice Programs: A Meta-Analysis of Recidivism and Other Relevant Outcomes, CRIMINOLOGY & CRIM J. (Nov. 30, 2023), https://journals.sagepub.com/doi/epub/10.1177/17488958231215228;
Effectiveness of Restorative Justice Programs, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojp.gov/pdffiles1/ojjdp/grants/250995.pdf (last visited May 6, 2025).

152. *See e.g.*, Zach Brooke, Behind the Walls, MILWAUKEE MAG. (Feb. 24, 2016), https://www.milwaukeemag.com/behind-the-walls-restorative-justice/.

153. ALKON & SCHNEIDER, *supra* note 70, at 341.

154. *See* Restorative Justice Map & Directory, NAT'L ASS'N OF CMTY. AND RESTORATIVE JUST., https://members.nacrj.org/rj-map (last visited May 6, 2025) (listing restorative justice service providers by categories: coalitions/associations, consultants and independent contractors, colleges and universities, direct service providers, and K-12 (primary & secondary) schools); see also Thalia Gonźalez, The State of Restorative Justice in American Criminal Law, 2020 WIS. L. REV. 1147, 1173 ("62% of all restorative justice laws fall outside the stages of criminal justice process, from arrest to parole and community reentry…the number of jurisdictions that have passed procedural restorative justice law that pertain to the pre-adjudication stage is 28%").

misuse of restorative justice by people who are not adequately trained and/or don't understand how RJ should work; and, finally, the inability to use it more frequently due to the additional resources it requires.

Voluntary participation by both victims and offenders is a core tenant of RJ.[155] Yet, victims may feel pressured to participate or forgive offenders,[156] while offenders may agree to participate only to avoid harsher consequences.[157] Defendants face great uncertainty in the traditional criminal legal system, including the trial penalty previously mentioned. Is a defendant voluntarily participating if they are doing so only to avoid harsher punishment? Victims may feel pressured to participate to help the defendant avoid a harsher punishment or because they are made to feel like it is expected of them. Annalise Acorn raised this concern and asks whether a process can be designed where victims "aren't expected to spend their time and energy sitting down with people who have raped, assaulted, tortured, or stolen from them, or murdered their loved ones, trying to work toward an amicable agreement."[158] However, restorative justice programs can be structured so the victim is not required to participate for the process to proceed.

As in other criminal processes, there is a concern that the defendant may be at a structural disadvantage due to the power imbalance and the lack of formal process rules to protect the defendant.[159] As was stated above, a condition precedent to participating in RJ is that the defendant must admit responsibility for the crime. RJ processes are not adjudicative—they do not determine whether the person is guilty.[160] This means that the process itself places the defendant in a less powerful position because they have admitted guilt. The process focuses on the harm the offender is responsible for and how the offender will repair the harm. There may be discussion about the offender's circumstances, but the victim is not there to take responsibility for those circumstances in the way that the offender is taking responsibility for the harm caused to the victim. Ideally, having a facilitator as a neutral should help lessen power imbalances, but there are examples where this has not happened.[161]

A related concern is that since RJ is an informal process, it may lack the formal protections of the traditional criminal legal system.[162] A key part of the RJ process is that defendants take responsibility for their offense.[163] In practice, these conversations are considered confidential, but there are concerns that there are no formal

155. ZEHR, *supra* note 142, at 48.

156. ANNALISE ACORN, COMPULSORY COMPASSION 161 (2004).

157. Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760 (2000) (criticizing restorative justice including that the power imbalance in the process leaves the "offender with a harsh choice: cooperate or go to jail.").

158. ACORN, *supra* note 156, at 161.

159. Delgado, *supra* note 157, at 758–71.

160. Restorative Justice: What is it and does it work?, *supra* note 140, at 168.

161. *See e.g.*, Dashka Slater, The Instagram Account That Shattered a California High School, N.Y. TIMES, https://www.nytimes.com/2023/08/17/magazine/ california-high-school-racist-instagram.html (last updated Apr. 25, 2024) (detailing a mediation between high school students resulting in victimized students feeling more scrutinized after the mediation than before it).

162. Delgado, *supra* note 157, at 759.

163. *See e.g.,* Restorative Justice: What is it and does it work?, *supra* note 140, at 164.

rules in place to protect confidentiality if the case is not resolved and goes back into the formal criminal legal system.[164]

Another concern is that RJ may be misused by those who look at it as an easy alternative process, or a quick way to resolve a case. RJ, if done right, involves preparation and would likely take more time than most cases going through the court system, unless they went to trial.[165] One concern is the "McDonaldization" of restorative justice by those who want to adopt a new process without investing the time and resources to make sure it is being done right.[166] The concern here is that the process could be dumbed down to the point where it isn't really an RJ process, but instead is "quickly arranged" with the "sole purpose of negotiating a restitution agreement . . ."[167] Alternatively, it could become a standardized approach, making it a precondition for plea deals or sentencing reductions. In all these examples, the concern is that the focus on healing and accountability may be overshadowed by procedural efficiency.

A related concern is that oversimplifying the process may lead facilitators and other participants to misunderstand its purpose, potentially causing more harm by applying it without adhering to its core principles.[168] This could be an even more serious concern if RJ is used for more serious crimes, particularly those involving significant power imbalances or severe trauma, such as sexual violence or domestic violence.

Another related concern is that RJ, when it is done right, is resource consuming. It takes more time than a simple plea bargain would take, and it can require additional human resources—the neutral.[169] Adding another player could make it more expensive. Who is paying the neutral? Where are the RJ meetings going to take place? Implementing restorative practices requires skilled facilitators, extensive preparation, and community engagement, all of which demand significant resources. These resource requirements may limit the availability of restorative justice.

Finally, a concern that is not generally discussed is that, in practice, RJ sits largely outside the criminal legal system in the United States. As discussed above,

---

164. *See generally* Mary Ellen Reimund, The Law and Restorative Justice: Friend or Foe? A systemic Look at the Legal Issues in Restorative Justice, 53 DRAKE L. REV. 667, 685–86 (2005) (criticizing the lack of law to protect the defendant in the restorative justice process).

165. MARK UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH, 35–64 (2001) (describing the process a facilitator should use to prepare for, conduct, and follow-up from a victim-offender mediation process).

166. *Id*. at 292–93.

167. *Id*. at 292.

168. Eli Hager, They Agreed to Meet Their Mother's Killer. Then Tragedy Struck Again, THE MARSHALL PROJECT (July 21, 2020, 6:00 AM), https://www.themarshallproject.org/2020/07/21/they-agreed-to-meet-their-mother-s-killer-then-tragedy-struck-again (detailing the use of an ostensibly restorative justice process used pre-conviction in a murder case in Florida that is a chilling example of the problems and damaging impact when RJ is used but not conducted professionally or in line with standard restorative practices).

169. *See e.g.*, Code of Conduct and Standards of Training and Practice, Restorative Justice Facilitators, COLO. COAL. OF RESTORATIVE JUST. DIRS. (Aug, 2015), https://rjcolorado.org/app/uploads/2024/06/CORJ-Facilitator-Code-of-Conduct-Standards-of-Training-Practice.pdf (detailing how facilitators (the neutrals) should manage a restorative justice proceeding including the code of conduct and training standards). There is no single approach in the United States in terms of training or who can act as a restorative justice facilitator. For a simplified list of the role of a facilitator in a restorative justice process see Victim Community Restoration Justice, VA. CTR FOR RESTORATIVE JUST., https://vcrj.org/Restorative-Justice (last visited May 6, 2025).

the main providers of RJ services are non-profits in the United States.[170] The courts do not hire or generally pay directly (if at all) RJ neutrals. If a case is sent out for an RJ proceeding, the prosecutor and the lawyer generally don't participate. The RJ proceedings are structured to have a neutral, the victim (or victim substitute), the offender, and, depending on the process, the family and representatives from the community. There is no role for defense lawyers and prosecutors. This means that unlike in problem-solving courts or plea bargaining, the players in the system often have little direct experience with RJ, how it works, and how it is different from a traditional criminal legal process in court.

Despite these concerns, RJ represents another example of a process that can be adopted due to plea bargaining. If the parties and the judge agree to divert a case to a restorative justice process, there is nothing in the law that prevents that diversion. Unlike with problem solving courts, in the United States the main advocates for RJ have been those outside the system advocating for the use of RJ to reform the criminal legal system.

C. Contributing to Change?

Does RJ contribute to change in the criminal legal system? It represents a fundamentally different approach to crime and punishment from the traditional legal system. RJ gives both victims and defendants a voice that is most often absent in the traditional legal process. There are higher satisfaction rates with RJ due to this part of the process. Traditional criminal courts often give no time for either victims or defendants to speak. There is no time spent trying to understand, in open court, why a defendant did what they did (unless it is a sentencing hearing or a few other processes such as a competency hearing). There is no opportunity for the victim to ask questions or be heard, outside of formal victim impact statements. There is no opportunity for family, friends, and the wider community to be involved in any meaningful way unless they are called as witnesses. RJ offers a process that changes all of this.

Some scholars suggest that the traditional criminal legal process could benefit from adopting some of these practices.[171] But, it may be harder to incorporate these changes into traditional legal processes. One challenge is that RJ is still happening largely outside of the traditional court system. This means that the insiders—the judges, prosecutors, and defense lawyers—often don't see the process, so, unlike problem solving courts, they do not get an opportunity to experience first-hand doing things differently. This can limit the impact that RJ may have on traditional criminal processes.

By emphasizing accountability, healing, and community involvement, restorative justice could influence bringing this approach to other reforms, such as problem-solving courts and, as will be discussed later, dispute system design. However, as with the other processes discussed above, restorative justice processes tend to stand alone and not be considered, except by RJ proponents outside the system, as a model for larger change within the criminal courts themselves. RJ proponents and

170. Restorative Justice Map & Directory, *supra* note 154 and accompanying text.

171. *See generally* Michael M. O'Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 STAN. L. & POL'Y REV. 463, 466 (2009) (suggests expanding an "RJ approach" in the criminal courts over a "treatment-based approach").

programs may suggest RJ for certain classes of cases. But, so far, RJ is used for a small number of cases in the United States and not in ways that contribute to larger systemic changes.

V. MEDIATION IN CRIMINAL CASES

Mediation, beyond restorative justice, is used in limited ways in the criminal legal system. In simple terms, mediation is a facilitated negotiation.[172] Mediation is commonly used to resolve civil cases.[173] In the civil context there are serious concerns about court-connected mediation.[174] One recurring concern is that mediation should not be mandated because the process itself should be fully voluntary to protect the parties' right to self-determination.[175] Another concern is that court-connected mediation focuses on settlements through "streamlined bargaining without addressing the deeper underlying interests and seeking creative solutions."[176] Putting aside the serious concerns about the shortcomings of court-connected and compulsory mediation, could mediation be used more often to facilitate plea bargaining?

A. Background

There are a few examples of jurisdictions that use mediation to resolve criminal cases, including Idaho, Kansas, and Kentucky.[177] An additional notable example of a recent adoption of mediation is in the 16th Circuit Court of Jackson County, Missouri. Judge Joel P. Fahnestock was a civil practitioner before taking the bench in 2009.[178] In this practice area, she worked with mediation regularly and saw its benefits as a settlement tool.[179] Judge Fahnestock started a voluntary program where judges act as neutrals to facilitate plea bargaining.[180] The prosecutor and defense lawyers who decide to use this program can decide which judge they would like to

172. LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS: A CONTEMPORARY APPROACH 12 (6th ed. 2019).

173. *Id*. at 263.

174. *See generally* Nancy A. Welsh, Making Deals in Court-Connected Mediation: What's Justice Got to Do with It? 79 WASH. U. L. Q. 787, 788 (2001) (arguing that court-connected mediation should not "glorified" judicial settlement conferences and a tool of settlement but instead should give disputants an opportunity to resolve underlying issues with a focus on justice and longer term, "creative, customized solutions").

175. Nancy A. Welsh & Andrea Kupfer Schneider, The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration, 18 HARV. NEGOT. L. REV. 71, 128 (2013) (discussing concern that mandatory mediation could be a violation of parties' right to self-determination); Jacqueline M. Nolan-Haley, Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent, 5 Y.B. ON ARB. & MEDIATION 152, 156–59 (2013) (recommending that mandatory mediation has "outlived its usefulness" as potential users are now educated about its value).

176. Welsh, *supra* note 174, at 791–94.

177. Jacob Leamon, Comment, Justice Unlocked: Resolving Plea Negotiations in Missouri with Criminal Mediation, 93 UMKC L. REV. 451, 457 (2024).

178. Biography of Judge Joel P. Fahnestock, 16TH CIR. CT. OF JACKSON CNTY., MO., https://www.16thcircuit.org/biography-judge-joel-p-fahnestock (last visited May. 9, 2025).

179. Interview with Joel Fahnestock, Judge, 16th Circuit Court of Jackson County, Missouri (Aug. 26, 2024) (on file with author).

180. *See generally* Leamon, *supra* note 177, at 457 (explaining a mediator is often a judge or retired judge with criminal law experience).

act as the neutral.[181] One goal was to have meaningful settlement negotiations before the eve of trial, avoiding the last-minute scramble to conclude a plea deal that had been the norm before this mediation program started.[182]

According to data collected by the District Attorney's office, as of October 8, 2024, over eighty criminal cases have gone through mediation.[183] As is typical with innovation in the criminal legal system, there are no rules surrounding this process. The lawyers can pick anyone to act as a mediator. Reportedly, prosecutors heavily favor judicial officers.[184] Judge Fahnestock has offered mediation training for judges, but they are not required to complete the training before accepting cases for mediation.[185]

The program has focused on more serious cases.[186] At first glance this may seem surprising, particularly if contrasted with restorative justice programs that more commonly focus on less serious cases. But, in terms of plea bargaining, it is often the more serious cases that have lower plea bargaining rates.[187] Therefore, mediation could help to settle cases that are harder to settle otherwise. One marker, and perhaps the primary marker, of success in these programs has been the high settlement rates, also referred to as "success rates."[188] For example, in Kentucky, Chief Justice John Minton Jr. testified in 2023 that the felony mediation program had been "successful in moving cases more rapidly" and had an "88% settlement rate."[189] Although these mediation programs are supporting and facilitating the long-standing process of plea bargaining, they are doing so in new ways. This raises the question about their impact or potential impact.

B. Contributing to Change?

Could increased use of mediation in criminal cases contribute to meaningful reform? One concern is that criminal mediation could mirror trends in civil mediation, where critics are concerned that the process has often been simplified to such a degree that its core ideals—such as empowering parties, fostering self-determination, and improving relationships—are no longer realized.[190] But, is it also possible that introducing a new process could have unintended positive consequences? In the 16th Judicial District in Missouri, one unexpected consequence was that the process gives defendants who are in custody a chance to speak with their family in a more private setting.[191] As is typical, in the local jail there are no private phone calls or visits.[192] The mediation process is conducted in the courthouse, and there

181. *Id*.
182. *Id*.
183. *See* Interview with Joel Fahnestock, *supra* note 179.
184. *Id.*
185. *Id.*
186. *Id.*
187. Hard Bargaining in Plea Bargaining, *supra* note 47, at 403.
188. Leamon, *supra* note 177 at 463 & n.127.
189. *Id*. at 462 & n.124.
190. *See generally e.g.,* Welsh *supra* note 174 (discussing the concerns about court connected mediation).
191. *See* Interview with Joel Fahnestock, *supra* note 179; see also Leamon, *supra* note 177, at 472–73.
192. *See generally* Cynthia Alkon, We Need to Talk: Modernizing Attorney-Client Jail Communications, 59 UNIV. RICH. L. REV. 199 (2025) [hereinafter "We Need to Talk"] (discussing the

is a room for the defendant where their families can join—giving them a chance to visit and talk in a way that is otherwise unavailable.[193] In addition, the mediations take longer than many (if not most) pre-trial court proceedings and stand-alone plea negotiations. In Jackson County, MO, 41% of the mediations are completed in less than three hours and 44% are completed in three to six hours.[194] This may seem a short amount of time, but given that plea negotiation conversations can be extraordinarily short and measured in minutes, not hours, the time is noteworthy. Defendants are often rushed to make quick decisions and may only have a few minutes to make the life-changing decision of whether to accept the plea deal or not.[195] In contrast, mediation, as practiced in Jackson County, MO, gives defendants potentially many hours to discuss their case and decide whether to take the deal. This is a significant difference and could decrease concerns about coercion as defendants are not as rushed as they can be in a traditional plea bargain.

As with the other processes discussed above, one key contribution that each of these processes can have towards meaningful change is that they can show what is possible and help the players in the system to see, firsthand, the advantages of change. So far, the 16th Judicial District's mediation program hasn't led to more far-reaching changes in how incarcerated defendants can communicate with their families. However, humanizing the system in a way that allows for better communication between some defendants and their families is a meaningful change.

VI. DISPUTE SYSTEM DESIGN

Dispute resolution processes are deeply embedded in the U.S. criminal legal system. Virtually every case goes through one or more of these processes. Yet, despite the heavy use of these alternative processes, many are not the result of a deliberate and collaborative effort involving stakeholders to define the objectives and determine the most effective strategies to achieve them. Dispute System Design ("DSD") is a dispute resolution process that could help to change that. DSD demands a more intentional, deliberate, and adaptive approach that is appropriate for intractable problems.

DSD is "the applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict."[196] DSD started in labor relations and has expanded far beyond that for civil conflicts.[197] As will be discussed, DSD is an interest-based process for planning and design and as such can be useful when starting new programs, new processes, or considering how to reform existing programs or processes.[198] This section will start by explaining what DSD is and how it has

---

nationwide problem of the lack of confidential electronic communications, including telephones, for people in custody).

193. Interview with Joel Fahnestock, *supra* note 179; *see also* Leamon, *supra* note 177, at 472–73.

194. Leamon, *supra* note 177, at 463.

195. *See e.g.*, Hard Bargaining in Plea Bargaining, *supra* note 47 at 408.

196. LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 7 (2020).

197. Lisa Blomgren Amsler, *Dispute System Design and the Global Pound Conference*, 18 CARDOZO J. CONFLICT RESOL. 621, 626 (2017).

198. *See generally* Cynthia Alkon, Designing for Justice: Pandemic Lessons for Criminal Courts, 52 STETSON L. REV. 185, 186 (2022) [hereinafter "Designing for Justice"] (discussing how the use of

been used in the criminal legal system. Then this section will discuss DSD as an appropriate process for wicked problems and how it could be useful in the specific context of reforming the criminal legal system.

A. Background

As stated above, DSD is an interest-based approach to designing or changing processes for dispute resolution.[199] There are a series of guiding principles and a framework for analyzing DSD. The guiding principles are:

> Create a DSD that is fair and just.
> Consider efficiency for the institutions and participants.
> Engage stakeholders—including users—in design and implementation.
> Consider and seek prevention.
> Provide multiple and appropriate interest-based and rights-based processes.
> Ensure users flexibility in choice and sequence of process options.
> Match the design to the available resources, including training and support.
> Train and educate system providers, users, and other stakeholders.
> Make the DSD accountable through transparency and evaluation, with appropriate concern for privacy, to improve it continuously.[200]

Restorative justice processes and problem-solving courts have used DSD when developing some programs.[201] However, DSD has not been widely used in the criminal legal system.[202] This became clear when the COVID-19 pandemic hit, and, within a ten-day period, all criminal courts around the country shut down.[203] There were few plans or clear processes in place for how to manage the crisis.[204] Courts around the country had Continuity of Operations Plans (COOPs) which are intended for short-term crises, such as hurricanes or the 9/11 terrorist attack, not long term planning.[205] COOPs focus on short term planning such as figuring out how many courtrooms would be needed and how to manage paperwork and record keeping.[206] As a result, it is not a collaborative process with all the stakeholders in the criminal legal system, but instead it is an internal court planning process.[207] Courts around the country tended towards top-down decision-making that did not include all of the key players, much less a larger stakeholder community.[208]

DSD could have helped criminal courts in the United States to better manage the shutdowns and changes in criminal court operations during the COVID-19 pandemic).

199. AMSLER ET AL, *supra* note 196, at 13–15.

200. *Id.* at 14–15.

201. Andrea Kupfer Schneider & Cynthia Alkon, Our Criminal Legal System: Plagued by Problems and Ripe for Reform, DISP. RESOL. MAG. 3–5 (Jan. 28, 2020), https://www.americanbar.org/groups/dispute_resolution/resources/magazine/archive/our-criminal-legal-system-plagued-problems-ripe-reform/ [hereinafter "Our Criminal Legal System"].

202. Designing for Justice, *supra* note 198, at 187.

203. Cynthia Alkon, *Criminal Court System Failures During COVID-19: An Empirical Study*, 37 OHIO ST. J. ON DISP. RESOL. 453, 456 (2022).

204. Designing for Justice, *supra* note 198, at 208–20.

205. *See id*. at 206–08.

206. *Id*. at 207.

207. *Id.* at 207–08.

208. *Id*. at 221.

According to a nationwide survey that I conducted during the first five months of the pandemic,[209] over 74% of defense lawyers reported that they were not consulted about key pandemic changes to court processes.[210] Some lawyers reported that this was consistent with long-standing practices in their jurisdictions where "the defense bar is never consulted regarding court procedures."[211] Defense lawyers were concerned that these changes had a direct impact on their clients, and, since the defense bar was left out of the decision-making process, these concerns were not considered.[212] What was perhaps most striking about the survey results were the dramatically different perceptions of who had given input during to the changes in process. Over 82% of judges thought that the defense bar was consulted on changes in which their input should have been included.[213] There are two key takeaways from the survey results for the purposes of this discussion. First, the vast majority of defense lawyers, a key player in the criminal legal system, reported that they were not part of the decision-making process. This indicates that whatever processes were in place they were largely not seen as inclusive and collaborative by at least one key group. Second, even without any formal DSD process in place, 25% or so of the courts used a process where defense lawyers did not report that they had been left out. This indicates that those courts likely used a more inclusive process.

Why does this matter? As was discussed above, intractable or wicked problems are best managed through processes that are inclusive so that information is gathered from a wide group of people to better analyze and understand the problems and dynamics. No single player in the criminal legal system intrinsically knows the perspective of all the players and stakeholders. For example, prosecutors and judges, unless they have been defense lawyers, are not necessarily focused on the challenge of confidential communications with clients who are in custody. Attorney client communication was a serious problem during the pandemic when the jails were closed. Lawyers could not meet with their clients in person, and they had serious concerns about confidentiality of telephone and video communications with their clients in jail.[214] DSD processes, by including key stakeholders, are more likely to collect better information about the concerns or problems, which is a key step towards finding better approaches for the future.

As Stephanie Smith and Janet Martinez observed, "attorneys are rarely faced with the need to design a system from scratch. More often, they must improve existing, flawed systems, or adapt an existing system to a new context."[215] Smith and Martinez described the process that Kaiser Permanente, a healthcare provider and medical group, used to redesign their dispute resolution program which relied on binding arbitration.[216] The first step was to appoint a "blue ribbon panel" who then "organized, shaped, and documented" the process.[217] Meeting one day a week

209. *See generally* Designing for Justice, *supra* note 198 (describing the process of conducting the survey and the findings).

210. *Id*. at 223–24.

211. *Id*. at 225.

212. *Id.*

213. *Id*. at 224.

214. We Need to Talk, *supra* note 192, at 199.

215. Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 125 (Winter 2009).

216. *See generally id.*

217. *Id*. at 135–36.

for three months this panel consulted with stakeholder groups and experts on healthcare and arbitration, conducted research and interviews, ultimately collecting information from over seventy-five people.[218] Kaiser largely adopted the panel's recommendations.[219] As Smith and Martinez describe, Kaiser used the "five diagnostic elements" to analyze and suggest changes to the process.[220]

The five diagnostic elements for DSD are to determine the goals, the process and structure, the stakeholders, resources, and to access success and accountability.[221] The element of goals includes both the types of conflicts the system will manage and what the system intends to accomplish.[222] In the criminal legal system context this could include the basic goals of justice, fairness, rehabilitation, reducing recidivism, and efficiency. Process and structure refer to what types of processes are used (or could be), how do these processes interconnect with each other and it could also include examining how the processes have changed (or not).[223] In the criminal legal system this could include looking at how plea bargaining impacts other processes, such as problem solving courts. The third element requires identifying the stakeholders.[224] In the criminal legal system, this could include the judges, prosecutors, public defenders, private defense lawyers, court personnel, probation department personnel, law enforcement, healthcare and mental health professionals, community organizations, and the general public. The fourth element is to determine the resources available for the process.[225] Criminal courts and the criminal legal system in general are often constrained by a lack of funding. The final element is to access success.[226] In the context of the criminal legal system this would require better data collection.[227] This element is also connected to establishing the goals. If the only goal is efficiency, then the only measure of success would be how quickly cases are processed. However, if the goals include rehabilitation, then tracking recidivism rates is important. The next section will discuss how using DSD could contribute to more meaningful change and reform in the criminal legal system.

B. The Promise of Change

DSD could change how criminal courts approach planning; this could, in turn, lead to fundamental changes in criminal processes. As has been discussed, dispute resolution processes currently used in the criminal legal system are largely not a product of a DSD approach that first analyzed the five elements in the framework and then applied the guiding principles. There are few examples of a wider stakeholder consultative process to understand how current processes work or to set goals. Criminal courts often focus on efficiency. This is the focus of conversations

218. *Id*. at 136.
219. *Id*. at 136–37.
220. *Id.* at 137.
221. Smith & Martinez, *supra* note 215, at 129–33.
222. *Id*. at 129–30.
223. *Id*. at 130–31.
224. *Id*. at 131.
225. *Id.*
226. *Id*. at 132–33.
227. Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019) (discussing the lack of data and the problem this presents both to lawyers and policymakers in the criminal legal system).

about existing processes, or new processes.[228] DSD's approach would introduce a more comprehensive process of both analysis and planning. Importantly, DSD demands the inclusion of all stakeholders and is a more comprehensive process of both analysis and planning. If courts around the country changed and adopted this process it could lead to far-reaching substantive changes in how criminal courts process cases.

One area that is ripe for DSD to consider is how technology could be used in the criminal legal system to help improve access to justice. Criminal courts are not generally early adopters of technology, largely due to resource limitations.[229] Yet, technology could improve access to justice in a variety of ways.[230] These include using virtual appearances to limit when defendants need to come to court, increasing access to information, and gathering better information. As Malcome Feeley observed decades ago, in low-level misdemeanor cases, the "process is the punishment."[231] Defendants who chose to fight their cases must come back to court repeatedly. Using technology, defendants could call in and not be required to take a day of vacation (likely unpaid) to wait for hours for their case to be called in court.[232]

DSD could be used to start pilot projects and to develop long-term strategies to transform the operations of criminal courts and integrate advanced technologies beyond traditional case management systems. Although efficiency does matter and is one of the guiding principles for DSD, it is not efficiency at the expense of justice. Increasing use of technology in the criminal courts demands adopting DSD so that considerations of justice and fairness are part of any expanded use of technology and not simply done for the convenience of the court without considering other stakeholders, including defendants and victims. As the pandemic illustrated, in the absence of a clear process to include key stakeholders in decisions, many concerns and viewpoints are left out. Increasing technology in the criminal legal system could be both complicated and complex- depending on the technology. Either way, DSD ensures a more collaborative approach which is likely to do a better job both analyzing the problems that new types of technology may address, and avoiding problems new technology might create.

DSD could also help to address some of the underlying concerns about how plea bargaining operates. For example, one concern is the use of hard bargaining such as telling defendants that they have "today only" to make a decision.[233] Or worse, that they have to decide in minutes.[234] DSD may be one way to approach these process concerns allowing for local agreements to make plea bargaining work better and be more justice focused especially in the absence of laws regulating plea

228. Thea Johnson, The Efficiency Mindset and Mass Incarceration, 75 OKLA. L. REV. 115, 121–22 (Autumn 2022).

229. Cynthia Alkon & Amy Schmitz, Opening the Virtual Window: How On-Line Processes Could Increase Access to Justice in the Criminal Legal System, 25 CARDOZO J. OF CONF. RES. 177, 215–216 (2023) [hereinafter "Opening the Virtual Window"].

230. *Id*. at 178 (discussing and giving examples of various types of technology that could increase access to justice in the criminal legal system).

231. MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199 (1979).

232. Opening the Virtual Window, *supra* note 229, at 202–04.

233. Hard Bargaining in Plea Bargaining, *supra* note 47, at 407–08.

234. *Id*. at 406–08.

bargaining and because so few plea bargained cases are appealed,[235] One example of a change in process, discussed above, is a Missouri judicial district using mediation in the plea bargaining process. One goal of that program is to plea bargain cases earlier in the process. That can have the impact of removing pressure to settle quickly which would give defendants more time to consider the plea offer. Plea bargaining is a complex process and a wicked problem. As was discussed above, it is highly resistant to change and reform. However, DSD could help to address some concerns in the plea bargaining process to make meaningful improvements. Using DSD demands that all the stakeholders are involved in both diagnosing the problem and proposing solutions. As was discussed above, plea bargaining reform that has been done through fiat—like banning plea bargaining—has hit serious resistance. In contrast, using DSD to focus on specific problems within plea bargaining in particular jurisdictions, such as reducing the last-minute scramble for plea deals in serious criminal cases, has tremendous promise to improve how the process works.

DSD could also help with more focused problems. As stated above, one of the challenges that criminal courts faced during the pandemic was that criminal defense lawyers could not easily communicate with their clients in custody. However, this is not a problem limited to the pandemic. Instead, the pandemic, as was often the case, highlighted an existing serious problem. Jails routinely record telephone and video calls and there are numerous examples of attorney-client calls being recorded with some of those recordings being turned over to the prosecution.[236] Lawyers are also concerned about who might be listening in to the call because the phones are not in private locations so other inmates and/or guards might be near and able to listen to the conversation.[237] This means that lawyers are often limited to speaking to their clients when they can make the time-consuming journey to the jail for a face-to-face meeting or when they are able to speak to their clients face-to-face when they are brought to court. When it is difficult to have confidential conversations with clients, it is difficult to talk about the criminal case and any possible plea deals. This often causes delays in criminal case processing as lawyers need to put cases over to have conversations with their clients. If this problem were considered to be a dispute system design problem, all the key stakeholders could be brought together to find solutions that would be justice-centered and help with better efficiency.[238] This is an example of a problem within the criminal legal system that is complicated (due to the number of players and the technology involved) but not complex. It is a defined problem that could be better addressed through DSD.

---

235. Nancy J. King & Michael E. O'Neill, Appeal Waivers and the Future of Sentencing Policy, 55 DUKE L. J. 209, 212 (2005) (appeal waivers are commonly included in a plea agreement).

236. Jordan Smith & Micah Lee, Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege, THE INTERCEPT (Nov. 11, 2015, 12:43 PM), https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/; Molly Burke, Lawsuit Filed Against NYC Corrections Over Call Recording, TIMES UNION (Apr. 17, 2024), https://www.timesunion.com/state/article/nyc-corrections-department-faces-lawsuit-phone-19406153.php; Jordan Smith, Securus Settles Lawsuit Alleging Improper Recording of Privileged Inmate Calls, THE INTERCEPT (Mar. 16, 2016, 12:03 PM), https://theintercept.com/2016/03/16/securus-settles-lawsuit-alleging-improperrecording-of-privileged-inmate-calls; Prison Phone Companies Recording Attorney-Client Calls, EQUAL JUST. INITIATIVE (Jan. 7, 2022), https://eji.org/news/prison-phone-companies-recording-attorney-client-calls/.

237. *See generally* We Need to Talk, *supra* note 192, at 204–10.

238. For longer discussions and recommendations, *see id.*

DSD could also be used to help improve existing programs.[239] A DSD process will include stakeholders to evaluate what is working and might need to change while focusing on justice. Veterans courts are one example where DSD could be a useful process to reimagine how these courts work and their availability. As was stated above, one of the criticisms of problem-solving courts is that they admit too few people and miss a large number who would benefit from the problem-solving approach.[240] Critics of veterans courts point to greater need for these courts due to the large number of veterans pulled into the criminal legal system who are suffering from traumatic brain injuries, post-traumatic stress, and other trauma related to our wars in Iraq and Afghanistan.[241] Reportedly one in three veterans have been arrested and approximately 181,000 are currently serving time.[242] Only a fraction of those veterans have been directly involved with a veterans court.[243] Advocates suggest revising eligibility criteria so these courts do not limit themselves to veterans with honorable discharges.[244] Advocates also suggest increasing the capacity of veterans courts to make these courts more widely available.[245] DSD could help both at a local level, so courts can evaluate whether to change the eligibility criteria and/or put more court resources into expanding the overall capacity of the veterans court in that jurisdiction. A DSD approach could also be adopted state-wide, or nationally, to analyze how these courts could better address the veterans' needs. Improving specific veterans courts is a complicated problem while addressing the larger needs of veterans is highly complex.

DSD is not a complete fix for the criminal legal system, although it holds tremendous promise to improve how existing processes works. The criminal legal system is itself a wicked problem, as are many of the problems within it. As the example above of veterans courts illustrates, the problems that veterans have when they enter the criminal legal system are complex. Veterans are often injured by their military service, and there are continuing criticisms about the failure of the military to address these problems. Veterans may also be more likely to be pulled into the criminal legal system due to factors beyond their legal service such as childhood trauma, including poverty, and limited access to mental health services (even with the Veterans Administration). A good DSD process can help to improve veterans courts in a jurisdiction and perhaps statewide. However, DSD is limited and would not be able to address these larger wicked problems that contribute to criminal behavior by veterans.

VII. CONCLUSION

The criminal legal system is a complex problem that has no easy fix. Yet, it uses a variety of dispute resolution processes that have changed how criminal cases are processed and have contributed changes in the culture to varying degrees. Even though the criminal legal system is highly resistant to change, change has happened

239. Our Criminal Legal System, *supra* note 201.

240. *Supra* notes 126–29 and accompanying text.

241. Jack Karp, Veterans Courts Help Some, But Leave Many Others Behind, LAW360 (Dec. 6, 2024), https://www.law360.com/articles/2270402.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

and is continuing to happen. One reason for this is that dispute resolution processes like plea bargaining have opened up the opportunity for innovation and change without needing to get buy-in from legislators or those outside the system.

What is largely missing is the recognition that one of the reasons that the criminal legal system is resistant to change is because it is a wicked problem. As a wicked problem, reformers need to use more adaptive processes that include information gathering and analysis from more stakeholders. In an ideal world, those working on criminal legal reform would coordinate their efforts with those working to address larger societal issues such as poverty, trauma, mental illness, education, and healthcare. At the very least, a more widespread recognition that the criminal legal system is a wicked problem would be a step forward. It would, hopefully, encourage more use of processes like dispute system design, that are more appropriate than top down or single issues approaches to reform. Recognition that reform in this area is working within an intractable or wicked problem would also be a step away from the calls for simplistic solutions such as higher jail sentences.