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## REVISITING ANNA MOSCOWITZ'S KROSS'S CRITIQUE OF NEW YORK CITY'S WOMEN'S COURT: THE CONTINUED PROBLEM OF SOLVING THE "PROBLEM" OF PROSTITUTION WITH SPECIALIZED CRIMINAL COURTS

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# REVISITING ANNA MOSCOWITZ'S KROSS'S CRITIQUE OF NEW YORK CITY'S WOMEN'S COURT: THE CONTINUED PROBLEM OF SOLVING THE "PROBLEM" OF PROSTITUTION WITH SPECIALIZED CRIMINAL COURTS\*

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## Abstract

This article explores New York City's non-traditional, judicially based response to prostitution. This article first recounts the history of New York City's Women's Court. It then examines the work of the Midtown Community Court, the "problem-solving court" established in 1993 to address criminal issues, like prostitution, in Midtown Manhattan. It also discusses the renewed concerns about sex work in New York and describe the movement, propelled by modern reformers, to address prostitution through specialty courts. It then contrasts the shared features and attributes of the Women's Court and Midtown Court models. Finally, the article urges modern reformers to

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**KEYWORDS:** prostitution, women, specialized criminal courts, Midtown Community Court, New York City, women's court

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### I. INTRODUCTION

Sex has been traded and sold at least since ancient times. Despite this history, in the United States, forceful anti-prostitution movements have periodically arisen. Such movements have been driven largely by individuals who, for various reasons, believe prostitution is a problem that poses a serious threat to our societal fabric. Time and again, these individuals have turned to the criminal justice system to solve that "problem."

In response, jurisdictions across the country have criminalized prostitution and promoted its vigorous prosecution. Yet, the sale and trade of sex continues. Apparently frustrated by the standard criminal justice approach to prostitution, some regions have recently begun to experiment with a non-traditional, judicially-based response—specialized criminal courts. Perhaps the most well-known such institution is the Midtown Community Court in New York City.

The Midtown Community Court was established in 1993 as a specialized, "innovative" court intended to address low-level crime, including prostitution, in the Times Square area.<sup>1</sup> Employing a purported

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“problem-solving” approach to quality-of-life offenses, the Midtown Court was intended to do more than ordinary criminal courts to address sex trade activities, and to help sex workers “leave the life.”<sup>2</sup> To achieve its goals, the Court allowed community members to play a strong role in the institution’s planning and development, involved itself in shaping local law enforcement responses to prostitution, and departed from existing criminal court procedures and sentencing practices.<sup>3</sup>

Following the Community Court’s first years of operation, fewer sex workers were seen in the Midtown Manhattan area.<sup>4</sup> Thus, proponents of the court declared it had succeeded in its “problem-solving” mission and urged other communities to replicate the Midtown experiment.<sup>5</sup> And, indeed, other jurisdictions are following Midtown’s lead.<sup>6</sup>

In reality, the Midtown Community Court’s “innovative” approach is far less novel than many might imagine. The use of specialized criminal courts to address prostitution is nothing new. In fact, it is an old idea that was first attempted in this country about a century ago. Perhaps the most notorious such institution was New York City’s Women’s Court, which opened its doors in 1910 and ultimately closed in the 1960s, after years of scandal, controversy, and failed efforts to prevent sex work.<sup>7</sup> New York City’s Women’s Court and the Midtown Community Court are, however, more than conceptually similar. Indeed, their development, their operational methods, and their impact on the practice of prostitution present remarkable parallels. In this Article, I examine the shared features and attributes of these court models, and argue that such institutions present their own set of problems that may threaten our societal fabric more than sex for money.

I begin my analysis in Part II of this Article by recounting the history of New York City’s Women’s Court. In describing the development and

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Becky Jacobs, Deseriee Kennedy, Carol Parker, Dean Rivkin, Laura Rosenbury, Otis Stephens, and Penny White for reviewing earlier drafts of this paper, and to Tom Galligan, Iris Goodwin, Jennifer Hendricks, Jeffrey Hirsch, and Paula Williams for their Tennessee encouragement and support. I am indebted to my research assistants, Tamara Tilley-Lindsay and tara Wyllie, for their truly excellent work. Finally, Sarah Berger, Kelley Dunn, Tigran Eldred, Abby Gans Mather, Paul Skip Laisure, and Kelly Robinson were most kind to listen to me as I expressed my delight in “discovering” Kross and her work. All mistakes and/or misstatements are my own.

1. *See infra* Part III.A.
2. *See infra* Part III.A.
3. *See infra* Part III.B.
4. *See infra* notes 238-43 and accompanying text.
5. *See infra* Part III.B.
6. *See infra* note 178 and accompanying text.
7. *See infra* Part II.

operation of the Women's Court, I focus on the critique of Anna Moscowitz Kross. Kross, a contemporary of the institution, called for its reform over several decades—while a law student, a lawyer, and then as a New York City Magistrate serving on the Women's Court bench. Her extraordinary story as one of New York's early woman attorneys and jurists, to date, has not been recounted in legal scholarship. For this reason alone, her Women's Court work is worthy of examination.<sup>8</sup>

More than this, Kross's well-founded criticisms of the Women's Court are historically and legally significant. For instance, as Part II describes, she questioned the wisdom of its proponents' moral reform agenda, condemned the undercover law enforcement methods it encouraged, and challenged its courtroom and sentencing practices, which she believed degraded and harmed women. Perhaps most importantly, Kross argued that the institution simply failed to do what it was intended to do—that is, prevent prostitution. In fact, Kross believed that prostitution should not be viewed as a criminal act, and could not be meaningfully addressed by the criminal justice system. Thus, she repeatedly urged abolition of the Women's Court. In 1967 her prescient plea was finally heeded when, after five decades of failed efforts to prevent prostitution, the New York City's Women's Court closed its doors.<sup>9</sup>

In Part III of this Article, I examine the work of the Midtown Community Court, the "problem-solving court" established in 1993 to address criminal issues, like prostitution, in Midtown Manhattan. I discuss renewed concerns about sex work in New York and describe the movement, propelled by modern reformers, to address prostitution through specialty courts. As in my account of the Women's Court, I highlight the economic and other motivations underlying the Midtown movement, the police crackdown it has encouraged, and the various "innovative" courtroom and sentencing processes it employs. In addition, I describe the results of this most recent court experiment which, like the Women's Court, largely fails to suppress prostitution.

Building on Kross's critique, in Part IV of this Article, I contrast the shared features and attributes of the Women's Court and Midtown Court models and offer my assessment that such institutions are less problem-solving than problematic. In operation, specialized criminal courts that

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8. As discussed *infra* note 129, this is the first in a series of projects relating to the work of Anna Moscowitz Kross. My next project, *Anna Moscowitz Kross and New York's Original Problem-Solving Court Movement: Lessons to Learn from a Lifetime of Criminal Justice Innovation*, looks at Kross's other ground-breaking reform work as mother of what I describe as the "original" problem-solving court movement. See *infra* note 129.

9. See *infra* Part II.D.

have attempted to address the “problem” of prostitution instead have allowed for special interest control of the justice system, fostered undesirable police and judicial practices, and failed to meaningfully address social problems. Moreover, such institutions have worked to simply divert attention from the real issue relating to prostitution—that is, its continued criminalization.

Thus, in Part V of this Article, I conclude by urging modern reformers to step back from the problem-solving court movement and their call for the creation of more such specialized criminal courts. Instead, I suggest that we need to carefully consider whether we are repeating history’s mistakes and wasting limited government resources on social reform efforts that fail to produce substantive results.

## II. ANNA MOSCOWITZ KROSS AND NEW YORK CITY’S WOMEN’S COURT

This Part describes New York City’s Women’s Court, a specialty court established at the beginning of the last century to deal with prostitution. It focuses on the critique of Anna Moscowitz Kross, a contemporary of the Women’s Court who believed that prostitution could not be meaningfully addressed by the criminal justice system and repeatedly called for the court’s abolition. Kross challenged the views of the court’s original proponents, the policing practices it encouraged, and its day-to-day processes. In addition, she argued that the Women’s Court, which had been ridden with scandal, simply failed in its mission of suppressing prostitution. Her call for the end of the institution was finally heard in 1967 when, as this Part explains, the Women’s Court finally closed its doors amid renewed controversy.

### A. Development of the Women’s Court

Anna Moscowitz,<sup>10</sup> a poor, teenage, Russian immigrant,<sup>11</sup> entered New

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10. Anna Moscowitz married Doctor Isidor Kross in 1917. Howard Whitman, *Annie, The Poor Man’s Judge*, COLLIERS, Mar. 1, 1947, at 46, 49 (on file with the Jacob Rader Marcus Center of the AJA). Thereafter, she added her husband’s surname to her own. See Martin Panzer, *A Real American and A Real Jewess: The Story of Magistrate Anna Moscowitz Kross Who Is Being Boomed for the State Supreme Court*, THE AM. HEBREW, Sept. 30, 1938, at 6 (on file with the AJA). For the sake of clarity, I will use the name “Kross” in referring to events after the 1917 marriage, and the name “Moscowitz” when referencing events prior to that time.

11. Moscowitz, born in 1891, moved with her family to the United States from Nishwez, Russia when she was three years old. JEWISH WOMEN IN AMERICA: A HISTORICAL ENCYCLOPEDIA 763 (Paula E. Hyman & Deborah Dash Moore eds., 1997); *Embattled City Aide: Anna Moscowitz Kross*, N.Y. TIMES, May 2, 1958, at 16 [hereinafter *Embattled City*].

York University Law School in 1908.<sup>12</sup> At that time, the law school had been admitting women for less than two decades,<sup>13</sup> and very few women were practicing lawyers.<sup>14</sup> Nevertheless, five-foot-two Moscowitz, a classmate and law school friend of Fiorello LaGuardia, boldly took on the cause of reforming the criminal justice system as a student.<sup>15</sup>

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*Aide*]; Whitman, *supra* note 10, at 47. Her family, with very limited financial resources, settled in New York City's Lower East Side. Panzer, *supra* note 10; Whitman, *supra* note 10 at 49. Kross's family lived in a small tenement apartment. Moscowitz's father worked as a buttonhole maker and, during her youth, Moscowitz held a variety of jobs to help bring money into the home, including stringing beads, working in a garment factory, and tutoring others new to the country. *Embattled City Aide*, *supra* note 11; Panzer, *supra* note 10; see also Denis Tilden Lynch, *Woman in State Supreme Court: Advocates Point to Mrs. Kross*, N.Y. HERALD TRIB., Aug. 28, 1938 (on file with the AJA) ("At eleven, during a vacation, she worked in a button factory. At seventeen she began teaching English to foreigners at the Educational Alliance and in the University Settlement."). Poor and Jewish, Moscowitz grew up facing injustice and discrimination. For instance, she was unable to attend her elementary school graduation because her family could not afford to buy her proper attire. Whitman, *supra* note 10, at 49. Moreover, while still a youth she was fired from an obviously much-needed job when she could not work on Saturdays, a day of religious observance. *Id.* (Moscowitz also recounted that her family had a bottle thrown at them as they held a Succoth ceremony); see also Panzer, *supra* note 10.

12. Moscowitz graduated from high school in 1907 and began studying to be a schoolteacher. JEWISH WOMEN IN AMERICA: A HISTORICAL ENCYCLOPEDIA, *supra* note 11, at 763. According to one press account, Moscowitz was bored by teaching. Whitman, *supra* note 10, at 49. Thus, at some point, a friend took Moscowitz to visit a New York City courthouse. *70,000 Work People Clients for Woman*, N.Y. TIMES, Jul. 22, 1923, at X7 [hereinafter *70,000 Work People*]. Drawn to legal practice, Kross applied to New York University Law School. Louis Mandel, *Exit Tour of Her 'Dream Come True'*, N.Y. HERALD TRIB., March 31, 1966 (on file with NYUA); Whitman, *supra* note 10, at 49. She taught school at night, while attending law school during the day, and won a law school scholarship. *70,000 Work People*, *supra* note 12.

13. New York University began admitting women, both in its separate Women's Law Class and regular law school, in 1890. See VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 121-30 (1998). Katherine Hogan, Cornelia Hood, and Melle Stanleyetta Titus appear to be the first women graduates of the regular law school in 1893, after attending the Women's Law Class. *Id.*; see Isabella Mary Pettus, *The Work of the Women's Law Class, New York University*, 1 WOMEN L. J. 20, 20-22 (1911). Pettus describes the Women's Law Class as being an "elementary course of forty-eight lectures, given in New York University, three times a week, during the winter" and explaining "those who study here are NOT lawyers" but that the class "aims to give to the average woman a glance at law." *Id.* Pettus continues that "The Women's Legal Education Society, which established the class, was founded in 1890 . . . [and] [a]bout this time the University admitted women to its law school as candidates and gave them an opportunity, of which many have availed themselves, to enter law as a profession." *Id.*; see also Phyllis Eckhaus, *Restless Women: The Pioneering Alumnae of New York University School of Law*, 66 N.Y.U. L. REV. 1996, 1998-99 (1991).

14. See Eckhaus, *supra* note 13, at 200 (noting that women who did practice law often encountered ridicule); Pettus, *supra* note 13, at 21 (noting that while over one thousand women had studied in the Women's Law Class between 1890 and 1911, a limited number went on to law school, and "comparatively few" became practicing attorneys).

15. Panzer, *supra* note 10; see also *Women's Bar Backs Mrs. Kross For State Supreme*



One of Moscovitz's main concerns<sup>16</sup> was the treatment of women charged with prostitution and processed in New York City's Women's Night Court, which had only recently opened its doors.<sup>17</sup> Indeed, the Women's Night Court began operating in 1910, largely in response to complaints by forceful crusaders,<sup>18</sup> who for years sought to suppress the "social evil" of prostitution in New York City.<sup>19</sup>

Starting at the turn of the century, vocal anti-vice advocates like Reverend Charles H. Parkhurst of the Madison Square Presbyterian Church,<sup>20</sup> and then the Committee of Fourteen,<sup>21</sup> a group of wealthy,

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*Court*, TELEGRAM, Sept. 14, 1938 (on file with the AJA) ("Kross recalls that [LaGuardia] was one of the few male students sympathetic to the idea of women's suffrage; that he joined a women's suffrage collegiate chapter which she formed with the late Inez Milholland."); Whitman, *supra* note 10, at 49 (referring to Moscovitz as "pint-sized").

16. Throughout her career, Moscovitz showed great concern for the underprivileged and marginalized, causing one commentator to write:

Her feeling about youth, about people in trouble and about just plain people is a natural bubbling over from her own youth in the melting pot of New York. Like so many who have risen high from the fecund tenements of the Lower East Side, she has carried with her an identity with humanity en masse, the humanity which teems and weeps but always hopes.

Whitman, *supra* note 10, at 47.

17. The cursory history of the Women's Court provided in this paper, intended to put Kross's work in context and reflect her thinking on the institution, draws largely from her own writings, including published articles and draft works. Reliance on Kross's writings about the courts is also significant to this project because, as will be further discussed in Part II, it has been suggested that Judge John M. Murtagh may have borrowed from her work without permission in writing his 1957 book, *CAST THE FIRST STONE*. See *infra* notes 162-165 and accompanying text.

18. Differing motivations and agendas, historically, have driven prostitution prevention efforts, sometimes resulting in seemingly disparate constituencies joining forces. For example, anti-prostitution campaigns during the late 1800s and early 1900s involved, among others, religious figures and purity groups interested in stamping out any and all vice, social reformers who wished to save innocent women from being lured into the sex trade, individuals concerned with overreaching and exploitation by government officials, and public health advocates. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 125-42, 328-32 (1993); TIMOTHY J. GILFOYLE, *CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920*, at 181-196, 298-306 (1992); CHRISTINE STANSELL, *CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860*, at 191-92 (1987). See generally THOMAS C. MACKEY, *PURSuing JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND NEW YORK CITY'S COMMITTEE OF FOURTEEN, 1920-1930* (2005) (discussing collaboration between the Committee of Fourteen and the National Women's Party in pressing, unsuccessfully, for the adoption of a "customer amendment" to criminalize the acts of those who sought to patronize prostitutes).

19. See FRIEDMAN, *supra* note 18, at 328-30; GILFOYLE, *supra* note 18, at 304; cf. VICE COMM'N OF CHICAGO, *THE SOCIAL EVIL IN CHICAGO: A STUDY OF EXISTING CONDITIONS* (1911) (describing the recommendations of the Vice Commission of Chicago, a municipal body appointed by the city's Mayor).

20. See Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 BROOK. L. REV. 133, 152 (1937) [hereinafter Kross &

influential citizens, complained that city officials, and in particular Tammany Hall politicians,<sup>22</sup> were not doing enough to prevent prostitution or fight the spread of venereal disease in New York City.<sup>23</sup> Responding to such complaints, New York Senator Clarence E. Lexow led an inquiry that demonstrated that law enforcement and city officials had been extorting payments from those running “disorderly houses” and brothels.<sup>24</sup> Moreover, many women who could not afford to bribe officers were threatened, arrested, and held at local station houses until they made bail,

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Grossman, *History and Organization*]; see also GILFOYLE, *supra* note 18, at 298-301 (“Parkhurst . . . ushered in a new era of antiprostitution reform lasting over a quarter century.”). Reverend Parkhurst, while wearing a disguise, visited saloons and brothels in 1892 to gather evidence to support his claims that police officers and Tammany Hall politicians permitted prostitution to continue with impunity. See ALFRED CONNABLE AND EDWARD SILBERFARB, *TIGERS OF TAMMANY* 211-13 (1967); see also John M. MURTAGH & SARA HARRIS, *CAST THE FIRST STONE* 210-24 (1957).

21. The Committee of Fourteen was the better-known incarnation of an earlier group known as the Committee of Fifteen. See THE COMM. OF FIFTEEN, *THE SOCIAL EVIL* (Edwin R. A. Seligman ed., 1912). The Committee of Fifteen, whose members included such luminaries as William Henry Baldwin, Jr., President of the Long Island Railroad, and George Haven Putnam, of G. P. Putnam’s Sons publishing company, met, wrote, and published the first edition of *THE SOCIAL EVIL* in 1902. *Id.* at iii-viii, 215-21. One of the main concerns addressed by the Committee in the *THE SOCIAL EVIL* was the operation of “Raines Law hotels,” which, unlike other businesses, were permitted to serve alcohol on Sundays and allegedly served as houses of “ill repute.” *Id.* at 135-43. A second edition of *THE SOCIAL EVIL* containing an additional section, “Part III: A Decade’s Development, 1902-1912,” called for further prostitution reform and recounted the work of The Committee of Fourteen. *Id.* at 163-245. The Committee of Fourteen, which existed for twenty-seven years, was also comprised of powerful individuals, and was backed by wealth from the likes of John D. Rockefeller, Jr. and Andrew Carnegie. See GILFOYLE, *supra* note 18, at 303.

22. As was once aptly noted, “[e]verybody has heard of Tammany Hall and nobody is sure exactly what it is.” CONNABLE & SILBERFARB, *supra* note 20, at 13. “Historically, Tammany is the birthplace of the Democratic Party, dating its origins to the Society of Saint Tammany, organized two weeks after George Washington took his oath of office.” *Id.* at 16. The Society “began as a fraternal order with liberal interests, and was converted into a powerful political machine which . . . played a major role in electing mayors, judges, governors, senators—and Presidents.” *Id.* For more on the history of Tammany Hall politics in New York City, see, for example, SEYMOUR J. MANDELBAUM, *BOSS TWEED’S NEW YORK* (1967).

23. See THE COMM. OF FIFTEEN, *THE SOCIAL EVIL*, *supra* note 21, at 147-54; Freda F. Solomon, *Progressive Era Justice: The New York City Women’s Court*, Paper for the Seventh Berkshire Conference on the History of Women, (June 19-21, 1987) (on file with the AJA); see also GEORGE J. KNEELAND, *COMMERCIALIZED VICE IN NEW YORK CITY* (1917) (chronicling the findings of the Bureau of Social Hygiene, a private commission formed in 1911 by Katherine Bement Davis, Superintendent of the New York State Reformatory for Women, John D. Rockefeller, Jr., and others, to study the problem of prostitution in New York City).

24. LEXOW COMM. REP., *NEW YORK CITY POLICE CORRUPTION INVESTIGATION COMMISSIONS, 1894-1994*, at 32-36 (1997).

innocent or not.<sup>25</sup> Bondsmen, very much part of the scene, charged exorbitant rates to secure the women's release.<sup>26</sup> Courts did little to address the situation.<sup>27</sup>

Following these discoveries, a specialized Night Court was established in 1907 within the City's Magistrates' Court system.<sup>28</sup> It was intended to help address concerns of anti-prostitution groups by preventing corruption and ensuring swift trials for accused prostitutes.<sup>29</sup>

With the inception of the Night Court as a venue to press their "moral reform" agenda, the Committee of Fourteen and other anti-prostitution advocates encouraged police to conduct "emergency raids by the wholesale" of hotels and tenement buildings believed to serve as brothels.<sup>30</sup> In their fervor, those affiliated with the Committee engaged in vigilante tactics, personally collecting evidence and assisting in prostitution prosecutions.<sup>31</sup> In this frenzied atmosphere, it was not long before the

25. *Id.* at 35; see also Anna Moscovitz Kross, Report on Prostitution and the Women's Court, Part I (History of the Women's Court) 2 (1935) [hereinafter Kross, History of the Women's Court] (unpublished report, on file with the AJA). To date, this author has been unable to locate the final version of Kross's 1935 report on prostitution and the Women's Court. However, instructive draft versions of the various "Parts" of the report are held by the AJA. In some instances, there are multiple drafts of the same Part. References to "History of the Women's Court," herein, are to the nineteen-page version among Kross's papers. References to "The Women's Court, Today," herein, are to the twenty-page version among Kross's papers. Press accounts also outlined the components of Kross's call for abolition of the Women's Court. See, e.g., *Mrs. Kross Favors Social War on Vice*, N.Y. TIMES, Mar. 9, 1935, at 2 [hereinafter *Social War*]; Tilden Lynch, *supra* note 11.

26. Kross, History of the Women's Court, *supra* note 25, at 2 (citing to Page Commission Report); see also *The Humanities Back of the Women's Court*, N.Y. TRIB., Nov. 30, 1919, at 2 [hereinafter *The Humanities Back*] (on file with the NYCHS) ("the women were bailed out at the station house by professional bondsmen at exorbitant rates").

27. Kross & Grossman, *History and Organization*, *supra* note 20, at 158-60; see also RAYMOND MOLEY, TRIBUNES OF THE PEOPLE: THE PAST AND FUTURE OF THE NEW YORK MAGISTRATES COURT (1932) 117 [hereinafter MOLEY, TRIBUNES OF THE PEOPLE].

28. Laws of 1907, Ch. 598, adding section 1397-a to the Greater New York Charter ("The Agnew Bill"); see Kross & Grossman, *History and Organization*, *supra* note 20, at 158 ("In 1907 a night court, known as the ninth district court, began to be held."); see also H. PAUL JEFFERS, THE NAPOLEON OF NEW YORK: MAYOR FIORELLO LA GUARDIA 138 (2002); MURTAGH & HARRIS, *supra* note 20, at 211-16, 222.

29. See Solomon, *supra* note 23, at 9; *The Humanities Back*, *supra* note 26, at 2; see also John M. Murtagh, *Problems and Treatment of Prostitution*, 23 CORRECTION 3 (1958) [hereinafter Murtagh, *Problems and Treatment*].

30. Kross, History of the Women's Court, *supra* note 25, at 3.

31. See GILFOYLE, *supra* note 18, at 303-04 (discussing the "vigilant method" employed by the Committee of Fourteen in pressing its agenda); MACKEY, *supra* note 18, at 7 ("New York City police arrested thousands of women over the course of the committee's life, and thousands went to jail because of evidence gathered and used against them in the Women's Court by the Committee of Fourteen."); MOLEY, TRIBUNES OF THE PEOPLE, *supra* note 27, at 118 (those affiliated with the Committee of Fourteen "assist[ed] the police in enforcing the

same kind of police corruption and abuses that previously existed again took hold.<sup>32</sup>

In 1908, when crusaders continued to complain that prostitution as a social problem was not being sufficiently addressed, Governor Charles Evan Hughes appointed yet another commission, headed by State Senator Alfred R. Page, to study the city's lower courts.<sup>33</sup> The Committee of Fourteen urged the Page Commission to modify the Night Court "to better the conditions of the unfortunate women" who appeared there, but also to abolish fines as a sanction for repeat offenders and better track those believed to involved in the sex trade.<sup>34</sup> Maude E. Miner, Executive Secretary of the New York Probation and Protective Association, presented the idea of a separate Women's Night Court before the Commission.<sup>35</sup>

In response, the Page Commission worked to have a law passed<sup>36</sup> that, in relevant part, separated men and women defendants, creating the

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law relating to prostitution, often accompanying them in the business of making arrests and carrying out raids"); *see also* KNEELAND, *supra* note 23, at 137-47.

32. MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 117 ("Until 1910, cases involving prostitution were heard either in Night Court or in one of the district courts. Men and women were tried together under conditions that, according to competent observers at the time, definitely tended to encourage vice and disorder. There was a divergence in disposition of cases due to the number of magistrates hearing them, and the small fines and suspended sentences which usually followed conviction did not serve to curb the activities of the prostitutes."); *see also* Murtagh, *Problems and Treatment*, *supra* note 29, at 3-6; THE COMM. OF FIFTEEN, *THE SOCIAL EVIL*, *supra* note 21, at 215-17.

33. *See* Kross & Grossman, *History and Organization*, *supra* note 20, at 159-61; *see also* Murtagh, *Problems and Treatment*, *supra* note 29, at 3; MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 21-26; THE COMM. OF FIFTEEN, *THE SOCIAL EVIL*, *supra* note 21, at 216. Hughes later became Chief Justice of the United States Supreme Court.

34. THE COMM. OF FIFTEEN, *THE SOCIAL EVIL*, *supra* note 21, at 220-21. The Committee's suggestions reflected the belief that some involved with prostitution, such as minors and first time offenders, were sad, fallen women who were in need of protection, and were morally redeemable. *Id.* at 147-54. They believed, however, that others, such as repeat offenders and those running houses of ill repute, were beyond salvation and required severe punishment. *Id.*; STANSELL, *supra* note 18, at 191-92 ("Antebellum Victorian culture generated two opposing images of the prostitute. One was the preyed-upon innocent . . . [t]he other image was the hard, vice-ridden jade."); *see also* Solomon, *supra* note 23, at 10-13.

35. *Katherine B. Davis's Colony Plan Opposed*, N.Y. EVENING POST, Dec. 11, 1916 (on file with the NYCHS); *see also* MAUDE E. MINER, *PROBATION WORK IN THE MAGISTRATES' COURTS OF NEW YORK CITY* 14-15 (1909) (noting that approximately one-third of women and girls placed on probation absconded, while many of the rest "who ostensibly adhere to the terms of probation, in reality are leading immoral lives during the time or return to a bad life as soon as the probation period expires"). Miner believed that probation was appropriate only for the woman who was "leading a life of prostitution for a very short time and has entered upon it through the influence of some man who has secured power over her or because she was temporarily in distress." *Id.* at 15-16.

36. *See* W. BRUCE COBB, *INFERIOR CRIMINAL COURTS ACT OF THE CITY OF NEW YORK*, ANNOTATED 270-82 (1925).

specialized Women's Night Court in 1910.<sup>37</sup> Aside from protecting

37. *Id.* at 270-77; see Kross, History of the Women's Court, *supra* note 25, at 2-3 (citing to Page Commission Report); see also Murtagh, *Problems and Treatment*, *supra* note 29, at 3; *The Humanities Back*, *supra* note 26, at 2.

Other controversial components of the law related to the mandatory testing of those arrested for prostitution for venereal disease, and forced long-term treatment and hospitalization of those found to be infected. See COBB, *supra* note 36, at 280-82 (explaining that Section 79, entitled "Medical Examination of Prostitutes," was "declared invalid by the Barone case"). In finding the provision unconstitutional, the New York Court of Appeals adopted the dissenting opinion of Justice Clarke in the Appellate Division, which indicated:

I cannot avoid the conclusion, therefore, that a woman coming within the provisions of the section receives a sentence not for the offense for which she was brought into court and upon which she has been convicted, but based upon her condition of health, in regard to which she has not had a hearing, and that under such circumstances she may be detained of her liberty, cured or uncured, for eleven months and twenty-nine days, where another woman convicted of the same offense but not diseased can in no event be deprived of her liberty for more than six months.

See *People ex rel. Barone v. Fox*, 202 N.Y. 616 (1911), reversing 144 App. Div. 629 (1st Dep't 1911); see also THE COMM. OF FIFTEEN, *THE SOCIAL EVIL*, *supra* note 21, at 231-35.

In later years, under New York's public health laws, detention for mandatory testing and diagnosis by the Board of Health was permitted. See, e.g., *People v. Johnson*, 252 N.Y. 387, 393 (1930) (upholding the practice of pre-sentence detention for purposes of testing alleged prostitutes for venereal disease and diagnosing them under Public Health Law Article 17-B, section 343, and distinguishing the practice from penalizing a defendant based upon infection, as was prohibited in *Barone*); *People ex. rel. Krohn v. Thomas*, 133 Misc. 145, 148 (Sup. Ct. Oneida Co. 1928) (Section 343 of article 17-B of the Public Health Law required that any person arrested for the offense of "vagrancy" be reported to the Board of Health, and could be detained for purposes of examination and diagnosis); see also Anna Moscovitz Kross & Harold Grossman, *Magistrates' Courts of the City of New York: Jurisdiction, Powers, and Duties of Magistrates*, 7 BROOK. L. REV. 295, 339 (1937) [hereinafter Kross & Grossman, *Jurisdiction, Powers, and Duties*]. The author refers to Johnson and Krohn and notes that while the testing and diagnosis provision was enacted as part of the Public Health law in 1918, use of the provision was sporadic and almost exclusively used to detain women. *Id.* Interestingly, however, the appellant in Krohn apparently was a man who was arrested for aiding and abetting prostitution and was held ten days for purposes of testing and diagnosis. *Krohn*, 133 Misc. at 146.

Under Mayor Fiorello LaGuardia's tenure, these detention practices apparently were enhanced in the City for purposes of venereal disease treatment. Anna Moscovitz Kross & Harold Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 449 (1938) [hereinafter Kross & Grossman, *Suggested Improvements*] ("It must also be pointed out that Mayor LaGuardia's recently instituted campaign to control venereal disease in New York City has had some effect in the Women's Court, in that no longer are diseased women permitted to leave the court to spread infection to the community. But the method of handling the venereal disease problem in the courts is still far from sound, as it continues to operate on the theory of compulsion and oppression, rather than education and cooperation. The convicted girl is given a jail sentence, and the acquitted girl is detained by the Board of Health under conditions almost indistinguishable from a jail sentence."); see also Solomon, *supra* note 23, at 10 (recounting that although the 1910 law requiring medical examination for venereal diseases for purposes of sentencing was "successfully challenged through the courts," a similar provision "eventually [was] reenacted in a constitutionally satisfactory manner").

women from police overreaching, unqualified bondsmen, and similar injustices, the specialty court, which primarily dealt with prostitution, was intended to “afford expert and socialized treatment of [such] cases without their being mixed in with the conglomerate and often demoralizing conditions of the average district” and to permit judges to “become well versed in the law and wisest policy appropriate” to prostitution.<sup>38</sup>

The court was supposed to employ procedures that reflected a “more tender regard . . . toward women, especially first or young offenders” capable of undergoing “reformation.”<sup>39</sup> It contemplated different treatment, however, for “more hardened [women] offenders.”<sup>40</sup> For example, the law essentially did away with fines and allowed harsher penalties, such as long-term placement in reformatories like the “Magdalen Benevolent Society”<sup>41</sup> and jail sentences of up to six months.<sup>42</sup> Thus, despite the alleged implementation of more protective and rehabilitative procedures, Moscowitz would later write that the new court merely substituted prison sentences as “a more drastic corrective measure” for most women.<sup>43</sup>

### B. Kross as Student Activist and Lawyer in the Women’s Court

When New York City’s first Women’s Night Court opened in 1910,<sup>44</sup> it

38. COBB, *supra* note 36, at 112; *see also* MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 117-18 (“Judges were chosen who seemed especially suited to the work, and it was hoped that concentration of interest would develop a technique in the handling of the cases.”).

39. COBB, *supra* note 36, at 275-77. For instance, women placed on probation were not sent to the separate Magistrates’ system probation court for generalized monitoring, but were required to “report to the women’s court magistrate, who attend[ed] at the court for such purpose one evening each week.” *Id.* at 277.

40. *Id.* at 275-77.

41. The Magdalen Benevolent Society has been described as one of several “local private reformatories” that “served as sites for young women’s moral rehabilitation.” Cheryl D. Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working Class Black Families, and New York State’s Wayward Minor Laws: 1917-1928*, 151 U. PA. L. REV. 2077, 2083 (2003).

42. COBB, *supra* note 36, at 318-24; *see also* Solomon, *supra* note 23, at 10-11 (“In the absence of fines and the sustained administration of the courtroom by [just] a few judges, procedures in the court became routine and sentences standardized.”).

43. Kross, *History of the Women’s Court*, at 2-3 (citing to Page Commission Report); *see also The Humanities Back*, *supra* note 26, at 2; *see also* Solomon, *supra* note 23, at 2 (noting that the court, designed to help women, actually hurt them).

44. The court was described as “the first court in the United States to be established as a special court dealing with women sex delinquents.” GEORGE E. WORTHINGTON & RUTH TOPPING, *SPECIALIZED COURTS DEALING WITH SEX DELINQUENCY* 274 (1969). Women’s Courts eventually opened in other locations in the City. For instance, in 1916, a Brooklyn Women’s Night Court was established. Kross & Grossman, *History and Organization*,

operated daily from a single courtroom at the Old Jefferson Market Court House, on Sixth Avenue in Greenwich Village from nine o'clock in the morning until all defendants were seen.<sup>45</sup> The Committee of Fourteen continued to collect evidence, encourage prosecutions, and closely monitor case dispositions within the court.<sup>46</sup>

Word of the unique women-only venue spread quickly.<sup>47</sup> Miner, appointed as the first probation officer in the Women's Night Court, believed that "giving publicity to the sordid fact that girls were being demoralized through prostitution . . . performed genuine service" of "helping to awaken the conscience of society to its responsibility for their emancipation" from the trade.<sup>48</sup> Thus, the court produced "publicity material" to encourage visitors, explaining that "[t]here is considerable space for spectators, the floors sloping from the entrance, so that all have a clear view of the proceedings."<sup>49</sup>

Moscowitz, however, and other members of the New York City Women Lawyers' Association, were appalled by the spectacle that placed accused women at center stage.<sup>50</sup> One such member, Bertha Rembaugh, complained:

[The Night Court] is now on one side frequented by a crowd of men, either associates of the women tried there, or those drawn by morbid curiosity, and on the other by a more shifting but almost always present group of fashionable men and women, who drop in after theater or dinner as they would perhaps to some vaudeville show.<sup>51</sup>

Moscowitz also worried that such visitors would "look upon [the

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*supra* note 20, at 163.

45. For a description of the "physical aspects of the court," see WORTHINGTON & TOPPING, *supra* note 44, at 292-94.

46. See THE COMM. OF FOURTEEN IN NEW YORK CITY, ANNUAL REPORT FOR 1915, 13-15, 29 ("The Committee is particularly interested in the disposition of cases in the Women's Court, and has advised with the Chief City Magistrate, Judge McAdoo, and with the magistrates assigned to the Court, to make the work of the Court more effective."). The Committee also sought to broaden the scope of evidence that could be used to convict alleged prostitutes in the Women's Court, offering the following hypothetical: "Suppose a man meets on the street, a woman previously unknown to him and after a few minutes' conversation she agrees to accompany him to a hotel. Can there be any reasonable doubt that such a woman is a prostitute, professional or casual?" *Id.* at xxii.

47. See Kross & Grossman, *History and Organization*, *supra* note 20, at 158; see also *The Humanities Back*, *supra* note 26, at 2.

48. Kross, *History of the Women's Court*, *supra* note 25, at 4 (citing MAUDE E. MINOR, *THE SLAVERY OF PROSTITUTION* (1919)).

49. MURTAGH & HARRIS, *supra* note 20, at 223.

50. Kross, *History of the Women's Court*, *supra* note 25, at 2-3.

51. Bertha Rembaugh, *Problems of the New York Night Court for Women*, 2 WOMEN'S L. J. 45, 45 (1912).

accused] as a criminal,” presuming “that if she were not guilty she would never be there, which is contrary to the fundamental principles of our law and of justice.”<sup>52</sup>

To preclude evening observers, some women’s organizations began advocating that Women’s Court sessions take place during workday hours.<sup>53</sup> Still in law school, Moscowitz “enlisted in the nightly investigations of the Women’s Night Court” conducted by the New York State Suffrage Association<sup>54</sup> and worked with the Prison Committee of the Church of the Ascension to provide reentry services for discharged women prisoners.<sup>55</sup>

In talking with the accused who appeared in the Women’s Night Court, Moscowitz recognized they were being wrongly stereotyped by proponents of the institution.<sup>56</sup> For instance, she heard for the first time of corrupt Vice Squad decoy officers who lured and entrapped women.<sup>57</sup> Moreover, Moscowitz learned that one of the greatest injustices the women faced was a lack of free legal representation in an intimidating, male-dominated system.<sup>58</sup> Ultimately, because there were no court-appointed lawyers available, the Women Lawyers’ Association lobbied to have its members appointed as volunteer defense attorneys for the alleged prostitutes.<sup>59</sup>

After graduating from law school in 1910<sup>60</sup> and becoming licensed to

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52. Kross, History of the Women’s Court, *supra* note 25, at 7.

53. *The Humanities Back*, *supra* note 26, at 2.

54. Kross Biography of Dec. 1964, at 5 (hand-typed biography) (on file with the NYCHS); see also *Embattled City Aide*, *supra* note 11 (recounting that as a law student Moscowitz spent much of her time advocating women’s suffrage and assisting women in the Women’s Night Court).

55. Kross Biography, *supra* note 54, at 5.

56. Kross, History of the Women’s Court, *supra* note 25, at 4.

57. Kross Biography, *supra* note 54, at 5.

58. *Id.* Indeed, Reverend Percy Stickney Grant, Rector of the Church of the Ascension, an organization that provided social assistance to accused prostitutes, had urged the appointment of women judges, police, probation officers and attendants in the court because the number of men present “so frightened [women arrested for the first time] that they could not defend themselves, the consequences being that they received sentences that turned them into real criminals.” Anna Moscowitz, *Women in Our Courts*, 4 WOMEN’S L. J. 52, 52 (1915) (discussing Grant’s presentation at a meeting held under the auspices of the Women’s Prison Association, following a scandal where five women probation officers were replaced with men); see also *Night Court Suggestions*, 5 WOMEN’S L. J. 13, 13 (1915) (“Let us have a properly qualified woman magistrate to judge cases with the male magistrate.”).

59. Rembaugh, *supra* note 51, at 45 (reporting on meetings during which it was urged that as an “experiment” court officials “assign us to first offender cases where there was no other attorney” and “that a woman attorney be kept in the Night Court for purposes of defense where needed and for purposes of observation at all times”).

60. Moscowitz, along with LaGuardia, received a Bachelor of Laws degree from New



practice two years later at age 21,<sup>61</sup> Moscowitz was among the first volunteers who took on such cases.<sup>62</sup> In 1913, she was named Chair of the Legal Committee of the Forum of the Church of the Ascension and provided free legal counsel to women in the Night Court.<sup>63</sup> While Chair, Moscowitz urged other women lawyers to join her in providing criminal defense representation.<sup>64</sup> By 1915, Moscowitz, then in her mid-twenties, was viewed by her peers as one of only a few “New York City women who . . . made a success at their chosen profession” of law.<sup>65</sup>

That year, Moscowitz wrote a Women Lawyers’ Journal article describing her experiences in, and thoughts about, the Women’s Night Court.<sup>66</sup> Moscowitz lauded efforts of that part of the “enlightened, philanthropic and progressive social element” who had fought to create a

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York University Law School in 1910. See New York University Seventy-Eighth Commencement Program, June 8, 1910, at 11 (on file with NYUA). Approximately one hundred and fifty LL.B. degrees were conferred in 1910, about fifteen of which were awarded to women. *Id.* at 10-12. Thirty-two Master of Law degrees were conferred, with apparently only one going to a woman. *Id.* at 9. Eight Juris Doctor degrees were awarded, three of which were apparently received by women. *Id.* In 1911, Moscowitz received her Master of Laws degree from New York University. See New York University Seventy-Ninth Commencement Program, June 7, 1911, at 10 (on file with NYUA).

61. Whitman, *supra* note 10, at 49 (Moscowitz, apparently had to wait until she was twenty-one years old to be admitted to the bar).

62. Kross Biography, *supra* note 54, at 5; see also Marion Weston Cottle, *Women in the Legal Profession*, 4 WOMEN’S L. J. 60 (1915) (“Six lawyers—all members of the Women Lawyers’ Association—recently volunteered to act as counsel for women prisoners in the New York Women’s Night Court. The names of the women are Mrs. Jean H. Norris, Miss Bertha Rembaugh, Mrs. Mary M. Lilly, Miss Anna Moscowitz, Miss Amy Wren, and Miss Sarah Stevenson, who are numbered among the women leaders of the New York bar.”). Interestingly, in a 1923 New York Times article, Moscowitz noted that after law school no law firm would hire her because she was a woman, and that she had to work in the law office of a friend for experience but no money. See *70,000 Work People*, *supra* note 12; see also DRACHMAN, *supra* note 13, at 217 n.6. She reportedly focused on labor cases, with her first matter being “that of a laboring man who had had trouble with his union.” *Id.* As discussed *infra* at note 90, Moscowitz returned to labor union work later in her life.

63. Panzer, *supra* note 10; Whitman, *supra* note 10, at 49; see also MURTAGH & HARRIS, *supra* note 20, at 224.

64. Anna Moscowitz, *The Opportunity of the Woman Lawyer in the Criminal Court*, 4 WOMEN’S L. J. 86, 86 (1914) [hereinafter Moskowitz, *Opportunity of the Woman Lawyer*]. Her attempts to recruit lawyers for the Women’s Night Court were seen as one of the earliest “effort[s] to protect the women in this court from the unscrupulous activities of certain members of the bar who sought to victimize them.” Murtagh, *Problems and Treatment*, *supra* note 29, at 3-6.

65. Jean H. Norris, *The Women Lawyers’ Association*, 4 WOMEN’S L. J. 28, 28 (1915) (discussing history of the Women Lawyers’ Association, which began as the Women Lawyers’ Club in 1899 with eighteen members and started publishing the Women Lawyers’ Journal in 1910).

66. Anna Moscowitz, *The Night Court for Women in New York City*, 5 WOMEN’S L. J. 9, 9 (1915).

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separate Women's Night Court in order to protect accused women,<sup>67</sup> and conceded that the new Court "at least point[ed] the way and furnishe[d] a solid basis for future reforms."<sup>68</sup> She insisted, however, that it did not solve the problem of prostitution.

Moscowitz argued that the "social evil" was one that had existed since biblical times and could not be prevented through criminal prosecution and court processes.<sup>69</sup> Rather, Moscovitz asserted that the social issue of prostitution was "an unhealthy growth on the healthy body politic."<sup>70</sup> This concept was "pushed into the background, not thought of or ignored" in the Women's Night Court, however, because accusations were "brought under some statute called by some legal name, and fall within some section of the law, aided by legal interpretation."<sup>71</sup> Thus, Moscovitz urged a more scientific approach to the question, one outside of criminal courts.<sup>72</sup>

Specifically, Moscovitz argued:

the treatment should be based on a knowledge of human nature and human suffering, severe if necessary, but always sympathetic. The cold q[uo]tation of a statute and the twisting of a section of the code will never accomplish a cure. THE EVILS OF THE NIGHT COURT CANNOT BE CURED BY LAW. Here is a wide field of labor waiting for sympathetic hearts and ready hands to bring about a more scientific system in the treatment of the downcast and fallen, which will yield a rich harvest for the community and a betterment for the victims in whose behalf wiser methods should be established.<sup>73</sup>

Although she stopped short of providing a blueprint for a new system, Moscovitz urged a less legalistic approach for dealing with prostitution, which she viewed as less a criminal act and more a social problem in need of attention.<sup>74</sup>

In a 1916 Committee report, Moscovitz complained that although the court had been created in part to head off actions of unscrupulous police and bondsmen, alleged sex workers continued to be unnecessarily

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67. *Id.* At this time, Moscovitz also suggested that the desire to create more "uniform rules in relation to procedure and fines" and to "reduce the immorality in the community" was commendable. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* Kross also noted that sentences were imposed in the court without sufficient concern for the woman's "future" or "possible redemption." *Id.*

72. *Id.*

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

74. *Id.*

detained.<sup>75</sup> Moreover, sentences were becoming harsher for the women, ranging from a term of probation for first-time offenders to a two-year prison term for those convicted more than twice.<sup>76</sup>

Moscowitz pointed out that women were still being arrested by “decoys” “dressed in civilian attire” who used various devices to lure the women, including “expending large sums of money in entertaining” them.<sup>77</sup> The word of the officer was generally sufficient to ensure conviction because no corroboration was necessary. Moscowitz complained that “the women’s word is never taken because the police cannot be discredited.”<sup>78</sup> Any woman entering the court lost the presumption of innocence as “[e]ven those that visit the court look upon her as a criminal.”<sup>79</sup>

As she continued working in the Women’s Night Court, Moscowitz grew increasingly disillusioned with its ineffective processes. In June of 1917, she wrote a public letter to Mayor John Purroy Mitchel reporting that unfair conditions persisted, vice officers continued to engage in improper policing, and the practice of prostitution continued unabated.<sup>80</sup>

The following year, John F. Hylan, a candidate with Tammany support, became the City’s new mayor.<sup>81</sup> In April 1919, seven years after Bertha Rembaugh had complained that the Women’s Court was treated by some as a vaudeville show, Court sessions finally were moved to daytime hours to curtail voyeurism<sup>82</sup> and new bail rules were created as a further attempt to prevent law enforcement and bond-related improprieties.<sup>83</sup> The mayor also appointed Jean H. Norris, one of the six members of the Women Lawyers’ Association who had originally volunteered to represent women in the Women’s Court,<sup>84</sup> to serve as the first female New York City Magistrate Judge in October of that year.<sup>85</sup> He specifically requested her placement in

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75. Kross, *History of the Women’s Court*, *supra* note 25, at 5.

76. *Id.*

77. *Id.* at 6.

78. *Id.*

79. *Id.* at 7. Thus, she argued: “The entire system is wrong and inefficacious and should be abolished. The punishment has no effect. It merely creates a constant chain of these unfortunate women between the Night Court and the prisons.” *Id.*

80. *Id.* at 8; *see also* Murtagh, *Problems and Treatment*, *supra* note 29, at 3.

81. JEFFERS, *supra* note 28, at 93, 102 (2002) (When Hylan was reelected in 1921 with a strong women’s vote, a Tammany boss claimed it disproved that “everything [is] corrupt in Tammany,” as women were “a great moral force.”); *see also* CONNABLE & SILBERFARB, *supra* note 20, at 261.

82. Eventually, a sign was posted in the courtroom that warned “[n]o idlers or sightseers are permitted to attend.” WORTHINGTON & TOPPING, *supra* note 44, at 294.

83. *The Humanities Back*, *supra* note 26, at 2.

84. *See supra* note 82 and accompanying text.

85. *Mrs. Jean H. Norris Appointed to Bench: First Woman Magistrate to be Named in*

the Women's Court.<sup>86</sup>

In the meantime, Moscowitz had married Doctor Isidor Kross.<sup>87</sup> She was also appointed as an Assistant Corporation Counsel,<sup>88</sup> the first woman named to that post.<sup>89</sup> In that position, which she held for five years, she represented the city in family court matters.<sup>90</sup>

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*This State Nominated by Mayor*, N.Y. TIMES, Oct. 28, 1919, at 4 [hereinafter *Mrs. Jean H. Norris Appointed to the Bench*] (noting that Norris was active in Tammany Hall, President of the National Women Lawyers' Association, and a member of the New York County Lawyers' Association); see also Ida Parker White, *Justice is Truth in Action*, THE BUS. WOMAN 8-9, 76 (1923) (on file with author) (describing Norris as a "woman who has climbed successfully to the top in the legal profession" by her appointment to the City's Magistrate Court).

86. With Norris's appointment, it was said that the Women's Court had become "thoroughly feminized," including the assignment of a female prosecutor. *Mrs. Jean H. Norris Appointed to the Bench*, *supra* note 85. As noted *supra* note 58, such "feminization" had been urged by members of the Women Lawyers' Association for years. Interestingly, some sources erroneously claim that Moscowitz was the first woman Magistrate Court judge in New York. See, e.g., *Embattled City Aide*, *supra* note 11; *Exit Tour of Her 'Dream Come True'*, *supra* note 12. Norris received her LL.B. degree from NYU in 1909, one year before Moscowitz, and her LL.M. in 1912, one year after Moscowitz received hers. See New York University Eightieth Commencement Program, June 5, 1912, at 9 (on file with NYUA).

87. Whitman, *supra* note 10, at 49. Moscowitz married Doctor Kross on April 5, 1917, the day he left to serve with a medical unit in Europe during World War I. *Id.* After marrying, Moscowitz initially went by the name "Anna M. Kross," to avoid confusion on legal documents. See Panzer, *supra* note 10. By the 1930s, however, she returned to using her family name, going by "Anna Moscowitz Kross," "[s]o there [would] be no doubt about" her Jewish heritage. Whitman, *supra* note 10, at 47. In talking about her family life, Kross said she was happy she did not marry a lawyer because it was best for spouses to have different professions. *70,000 Work People*, *supra* note 12. Moreover, she believed she was "lucky" in "marrying a doctor who was willing she should keep with her work" and did not "feel neglected." *Id.* Between 1923 and 1933, Moscowitz Kross had three daughters, one of whom died at age five. Whitman, *supra* note 10, at 49. Her surviving daughters, Helen and Alice, went on to attend Oberlin College and become doctors. *Id.*

88. The Office of the Corporation Counsel represents the City of New York in its legal affairs. See *Brief History of the New York City Law Department Office of the Corporation Counsel*, available at <http://www.nyc.gov/html/law/pdf/history.pdf> (last visited Feb. 11, 2006). Kross had become involved in politics as a "protégé" of Democrat Alfred E. Smith, who served four terms as New York's governor. See Panzer, *supra* note 10; see generally CHRISTOPHER FINAN, ALFRED E. SMITH: THE HAPPY WARRIOR (2002).

89. On January 8, 1918, Terey T. Grant of The Church of the Ascension, probably a relative of Rev. Percy Stickney Grant, wrote a letter of recommendation for Moscowitz to Mayor Hylan for the Assistant Corporation Counsel position, indicating that for nearly three years Moscowitz had "been Chairman of the Legal Committee of the Public Forum (Inc.) of the Church of the Ascension which committee altruistically gave its time and effort in defense of the unfortunates in the Women's Night Court." Letter from Terey T. Grant, Church of the Ascension (Jan. 18, 1918) (on file with the AJA); see also *supra* note 58.

90. During this time, Moscowitz produced an "intensive study of the problems and the shortcomings of both the Family and the Domestic Violence Courts." Kross Biography, *supra* note 54, at 5. After resigning, she returned to trade union work. *Id.* at 5; Whitman, *supra* note 10, at 49; see also Panzer, *supra* note 10. In 1923, she was named general

During the the 1920s, arrest rates continued to rise and fewer prostitutes openly solicited customers in public places.<sup>91</sup> Anti-prostitution crusaders, including some affiliated with the Committee of Fourteen, declared victory in their war against the “social evil.”<sup>92</sup> In reality, however, many prostitutes simply changed practices in order to avoid apprehension and became more discreet in seeking customers.<sup>93</sup> As organized enterprises developed to help perpetuate underground sex trade activities, concerns about government involvement in the underworld emerged once more.<sup>94</sup>

After Kross’s law school friend, Fiorello LaGuardia, lost the 1930 mayoral race to Tammany Hall controlled incumbent Jimmy Walker, LaGuardia began a campaign to shed light on improper conduct of city officials allegedly connected to vice activities.<sup>95</sup> Others in the community joined LaGuardia in calling for an end to such practices.<sup>96</sup> Governor Franklin Delano Roosevelt<sup>97</sup> asked the Appellate Division to conduct yet another inquiry into the workings of the city’s lower courts.<sup>98</sup> Judge Samuel Seabury oversaw the investigation.<sup>99</sup>

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counsel to the Building and Allied Trades Compensation Service Bureau, where she was “legal advisor to some 70,000 workers.” *70,000 Work People*, *supra* note 12.

91. GILFOYLE, *supra* note 18, at 306-07; *see also* MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 132-37.

92. GILFOYLE, *supra* note 18, at 306-07; *see also* MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 132-37 (noting that the number of women arraigned in the Women’s Court went from 1,742 in 1926, to 3,924 in 1929). Members of the Committee were reportedly “so intent . . . on securing arrests that they seemed not to have realized what was going on.” *Id.* at 132. Indeed, the Committee claimed prostitution was being meaningfully addressed by the magistrate judges, who were described in a 1927 report as being “progressive, sympathetic and at the same time scientific.” *Id.* at 133.

93. *See* GILFOYLE, *supra* note 18, at 307-09; *see also* MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 132-37; Murtagh, *Problems and Treatment*, *supra* note 29, at 3-6. Although some argued that driving prostitutes underground and “into residence districts” made “conditions worse rather than better” for them, the Committee believed that there was “nothing in this argument.” *THE COMM. OF FOURTEEN IN NEW YORK CITY*, *supra* note 46, at xiii.

94. *See* GILFOYLE, *supra* note 18, at 310; JEFFERS, *supra* note 28, at 130-39.

95. CONNABLE & SILBERFARB, *supra* note 20, at 279-80; JEFFERS, *supra* note 28, at 130-39; *see also* MURTAGH & HARRIS, *supra* note 20, at 231.

96. JEFFERS, *supra* note 28, at 137-39 (discussing LaGuardia’s indictment of Magistrate Court practices and similar concerns voiced by various “good government” groups in New York City); MOLEY, *TRIBUNES OF THE PEOPLE*, *supra* note 27, at 118-19 (“In 1929, there were sixty-five organizations cooperating with the Committee of Fourteen” in its efforts to attempt to rid the city of vice); *see also* MURTAGH & HARRIS, *supra* note 20, at 231-32.

97. JEFFERS, *supra* note 81, at 138-39 (noting that Roosevelt was planning to run for president in 1932).

98. *See* Kross & Grossman, *History and Organization*, *supra* note 20, at 166; CONNABLE & SILBERFARB, *supra* note 20, at 279-80; *see also* Murtagh, *Problems and Treatment*, *supra* note 29, at 3-6.

99. SAMUEL SEABURY, *IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES’*

Seabury uncovered scandalous activities in the Women's Court.<sup>100</sup> Assistant District Attorney John C. Weston had accepted bribes from lawyers and police officers in exchange for favorable treatment for certain alleged prostitutes, many of whom were innocent.<sup>101</sup> In addition, Magistrate Judge Jean Norris was charged with, among other things, "substantially alter[ing] the record of the trial" of at least one woman charged with prostitution to ensure her conviction.<sup>102</sup>

Seabury's work resulted in disciplinary action against numerous lawyers, the voluntary resignation of several magistrates, and the involuntary removal after trial of two others, including Jean Norris.<sup>103</sup> Moreover, the District Attorney's Office withdrew from the Court, leaving only police representatives to serve as prosecutors in prostitution cases.<sup>104</sup> Nevertheless, the Women's Court continued to operate. Although Kross

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COURT IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURT (Mar. 28, 1932) [hereinafter SEABURY, INVESTIGATION OF THE MAGISTRATES' COURT] (Seabury authored a two hundred and fifty-six page report outlining the various facets of his investigation of the Magistrates' Courts and the evidence uncovered); Kross & Grossman, *History and Organization*, *supra* note 20, at 166; *see also* MOLEY, TRIBUNES OF THE PEOPLE, *supra* note 27, at 42-51.

100. CONNABLE & SILBERFARB, *supra* note 20, at 280-81; Kross & Grossman, *History and Organization*, *supra* note 20, at 166 ("The details of the Seabury investigation need no repetition. The vice squad of the police department, aided by the carelessness, if not culpability, of certain of the magistrates who sat in the Women's Court, conspired to prosecute women as a means of extortion."); *see* Solomon, *supra* note 23, at 11; *see also* Murtagh, *Problems and Treatment*, *supra* note 29, at 3-6. Norris, the first woman magistrate judge in the City, was the first magistrate subpoenaed by Seabury in his investigation. *See Jean Norris Faces New Inquiry Today; Magistrate Subpoenaed After Earlier Failure to Appear*, N.Y. TIMES, Feb. 26, 1931, at 3 (reporting that Norris had been subpoenaed and questioned privately, outside of the presence of her attorney, Martin Conboy).

101. MOLEY, TRIBUNES OF THE PEOPLE, *supra* note 27, at 135-37 (noting that many prostitution arrests were being made during this period without sufficient evidence, and that after the Seabury investigation, the number of arrests and arraignments sharply declined); *see also* MURTAGH & HARRIS, *supra* note 20, at 232 ("In Women's Court, where prostitutes were tried, lawyers, bondsmen, plain-clothes policemen, court personnel, and an assistant district attorney were organized into an extortion ring that operated among innocent women as well as professional prostitutes.").

102. SEABURY, INVESTIGATION OF THE MAGISTRATES' COURT, *supra* note 99, at 238-48; *see also* *Magistrate Norris Goes on Trial Today*, N.Y. TIMES, June 22, 1931, at 5; *Mrs. Norris Admits She Convicted Girl Without Evidence*, N.Y. TIMES, June 25, 1931, at 1.

103. SEABURY, INVESTIGATION OF THE MAGISTRATES' COURT, *supra* note 99, at 11, 49, 238-242 (noting that an Interim Report dated May 28, 1931 had outlined the various wrongdoings by Norris, resulting in her removal from office); *see also* *Mrs. Norris Fights to Appeal Removal*, N.Y. TIMES, Aug. 28, 1931, at 2 (noting that Norris was removed from the bench on June 25, 1931).

104. *See Prostitute Cases Go Unprosecuted*, N.Y. TIMES, May 16, 1967, at 47; *Prostitution; Leary Changes the Rules*, N.Y. TIMES, May 21, 1967, at E2.

had been named as a possible replacement for Norris,<sup>105</sup> she was passed over for the position.<sup>106</sup>

### C. Kross as Judge in the Women's Court

Largely because of the scandals unleashed by the Seabury investigation, Mayor Walker resigned from office,<sup>107</sup> and John P. O'Brien was chosen to complete his term.<sup>108</sup> O'Brien lost to Fiorello LaGuardia in the next mayoral election,<sup>109</sup> but on December 31, 1933, his last day in office, O'Brien appointed Anna Moscovitz Kross as a Magistrate Court judge.<sup>110</sup> Kross took office on January 1, 1934, the same day her former classmate became Mayor and nearly twenty-five years after she first began critically observing in the Women's court while still in law school.<sup>111</sup> She was promptly assigned to the Women's Court at Jefferson Market.<sup>112</sup>

After serving only one week in the Women's Court, Kross reaffirmed her position that prostitution was not a problem that could or should be addressed by the criminal court system.<sup>113</sup> Speaking at a luncheon for the New York City Federation of Women's Clubs, she said she "was more than ever convinced that the only hope of getting at the roots of the problem of prostitution was to take it out of the courts, out of the category of crime, and 'devise some system of handling it socially.'"<sup>114</sup>

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105. *20 Women Seeking Norris Post on Bench*, N.Y. TIMES, July 16, 1931, at 20 (naming Moscovitz Kross as one of the "Tammany Women" who could replace Norris, noting that she had previously reported to "Mayor John Purroy Mitchel on the work of the Police Department in cases in the Magistrates' Courts [and] urged that this work be taken from the Police Department and entrusted to a welfare commission that would handle it along scientific lines").

106. *Mrs. Norris Fights to Appeal Removal*, *supra* note 103, at 2 (recounting Walker's appointment of Guy Van Ambringe as a new magistrate).

107. JEFFERS, *supra* note 28, at 145-48; *see also* CONNABLE & SILBERFARB, *supra* note 20, at 279-85.

108. JEFFERS, *supra* note 2881, at 148, 150 (noting that O'Brien was chosen by Tammany bosses to run for the position); *see also* CONNABLE & SILBERFARB, *supra* note 20, at 285-86.

109. JEFFERS, *supra* note 28, at 150, 157; *see also* CONNABLE & SILBERFARB, *supra* note 20, at 286.

110. Whitman, *supra* note 10, at 49; *see also* *New Magistrates Assigned*, N.Y. TIMES, Jan. 3, 1934, at 2 (noting that "then Mayor" O'Brien appointed Moscovitz Kross a few days before, and that she was assigned to the "Jefferson Market Court" by Chief Magistrate James McDonald).

111. *Mrs. Kross Scores Vice Case Methods*, N.Y. TIMES, Jan. 14, 1934, at 24; Whitman, *supra* note 10, at 49.

112. *Mrs. Kross Scores Vice Case Methods*, *supra* note 111; Whitman, *supra* note 10, at 49.

113. *Mrs. Kross Scores Vice Case Methods*, *supra* note 111.

114. *Id.*

Kross again criticized vice officers for posing as customers and becoming a part of the underworld in order to obtain evidence against women.<sup>115</sup> It would be more appropriate, she believed, for trained social workers to intervene.<sup>116</sup> She also challenged the wisdom of treating women as criminals when their “only offense” was “against a social, moral or religious code.”<sup>117</sup> Again, although she offered “no definite substitute” for the criminal court as a forum, she “suggested the possibility of a bureau, hospitalization and clinics.”<sup>118</sup>

Ultimately, Mayor LaGuardia invited Kross to present a more formal proposal for modification of the Women’s Court.<sup>119</sup> In 1935, she provided him with a lengthy written report that recommended abolition of the court in its entirety.<sup>120</sup> This remedy was necessary, she argued, because in its twenty years of operation, the Women’s Court had failed to accomplish any of its supposed goals—to rid the city of prostitution, to prevent the spread of venereal disease, or to rehabilitate women coming before the court.<sup>121</sup>

In a draft of the report,<sup>122</sup> she reiterated her belief that it was inappropriate to address what is, “at worst . . . a moral digression” as a crime.<sup>123</sup> She submitted that many who had supported creation of the Women’s Court had “a naïve faith in the omnipotence of the law,” were

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* At the same luncheon, Magistrate Jeanette G. Brill reported on legislation that had been introduced in Albany to “wipe out the word ‘prostitution’ and establish a social court and work out the problems on a social basis, and instead of the present indeterminate term of one to three years, set the maximum sentence at six months, with the judge having discretion as to suspending sentence or giving probation or hospitalization.” *Id.*

119. At a luncheon of the Sisterhood of Congregation B’nai Jeshurun in October of 1934, Kross called the Women’s Court “the most unfortunate of courts” and explained that “her plan for a substitute agency to care for” prostitutes would be released in a few days. *Mrs. Kross Opposed to Women’s Court*, N.Y. TIMES, Oct. 19, 1934, at 25; see also Tilden Lynch, *supra* note 11 (“Almost immediately on her appointment to the bench . . . the Mayor asked [Kross] to survey the Women’s Court and formulate a plan for remedying its evils.”).

120. Anna M. Kross, Report on Prostitution and the Women’s Court, Part III (The Women’s Court, Today; A Challenge) 2 (1935) [hereinafter Kross, The Women’s Court, Today] (unpublished report) (on file with the AJA). As noted *supra*, in note 25, to date I have been unable to locate a copy of the final version of the report.

121. *Id.* Upon release of the report, the *New York Times* quoted Kross as saying:

We must first recognize that prostitution is a social problem, not an offense, misdemeanor or crime, and that this problem does not belong in our courts. We have, by our police and court method, been proceeding against the victims of prostitution rather than the structure of commercialized vice.

*Social War*, *supra* note 25.

122. See *supra* note 25.

123. Kross, History of the Women’s Court, *supra* note 25, at 11.



wrongly seeking to legislate morality, and demonstrated misplaced zeal in trying to “rescue the ‘fallen women.’”<sup>124</sup> In particular, she criticized the “powerful” Committee of Fourteen, which had cooperated in the development and perpetuation of the court, while “incomprehensibl[y]” closing its eyes to its inherent problems.<sup>125</sup> Indeed, such “half hearted gestures” in seeking to address the issue of prostitution, Kross argued, had become “boomerangs, inflicting upon society the greater shame of the corruption of its court and its officers of the law.”<sup>126</sup>

She conceded that prostitution was a social problem that needed to be addressed, given its moral offensiveness to many citizens, its tendency to degrade those involved in its practices, and its contribution to the spread of disease.<sup>127</sup> Kross, however, urged “approach[ing] the problem with realism, and dignity,” without the “old vindictive spirit of the moral reformers” and armed “instead with the viewpoint and equipment of a scientific age.”<sup>128</sup>

Accordingly, Kross suggested a “medical-social” method of handling such matters,<sup>129</sup> which she explained was being used in Great Britain.<sup>130</sup>

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124. *Id.* at 12.

125. *Id.* at 14.

126. Anna M. Kross, Report on Prostitution and the Women’s Court, Part IV (The New Plan) 3 (1935) [hereinafter *The New Plan*] (unpublished report) (on file with the AJA).

127. *Id.* at 3-4. Moscowitz Kross claimed that she, personally, was not concerned with the morality of the prostitute, “being convinced that it is not the business of the police, or of the courts, or the community to tell people how moral they should be.” *Id.*

128. *Id.*

129. Kross’s ultimate proposal of a “medical-social” method for addressing prostitution reflected her apparently ever-increasing belief that certain behaviors, which were viewed as deviant, should be studied and treated scientifically. This thinking ran through many of Kross’s later criminal justice experiments. See *infra* note 298 and *supra* note 8; see also Mae C. Quinn, Anna Moscowitz Kross and New York’s Original Problem-Solving Court Movement: Lessons to Learn from a Lifetime of Criminal Justice Innovation [hereinafter Quinn, New York’s Original Problem-Solving Court Movement] (work in progress) (on file with author). Indeed, while serving as New York City Commissioner of Corrections from 1953 to 1966, Kross went so far as to suggest that corrections facilities needed to “do a job of human engineering.” See ANNA M. KROSS, N.Y. CITY DEP’T OF CORRECTIONS, ANNUAL REPORT iii (1954) (on file with the AJA). These assertions seem to conflict with Kross’s claim that early anti-vice crusaders, like the Committee of Fourteen, were misguided in their attempt to “rescue” prostitutes against their will, as described *supra* in note 124 and accompanying text, and represent the kind of norm-based assumptions that have been criticized by some feminists and others. See FEMINIST LEGAL THEORY FOUNDATIONS 211 (D. Kelly Weisberg ed., 1993) (explaining that some feminist scholars, borrowing from postmodernist thinkers like Michel Foucault, reject sameness-difference evaluations); see generally LOIS McNAY, FOUCAULT & FEMINISM (1992). Kross’s thoughts in this regard also reflect what some have referred to as a eugenics approach to social reform. See generally Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63, 66 (1998) (“Rejecting laissez-faire conceptions of state and society as inadequate to the governmental needs of the ‘modern’

Towards this end, she proposed the creation of an informal tribunal consisting of a doctor, a psychiatrist, and a lawyer who would ensure appropriate social services, medical treatment, and other programs for prostitutes, instead of the Women's Court.<sup>131</sup> The tribunal, Kross explained, would be similar to other administrative boards created under the law, much like the board that reviewed workers' compensation claims.<sup>132</sup> While detention might be used under some circumstances, Kross's intention was to replace the then existing "punitive and repressive" system with one based upon "cooperation" and voluntary involvement in treatment.<sup>133</sup>

Thus, Kross's goal was to provide meaningful sex education for the entire community, particularly young people, and free medical treatment for those "persons engaged in the pursuit of a profession which places them in the likelihood of having contracted [venereal disease] and the danger of [t]ransmitting it to others."<sup>134</sup> Moreover, rather than continue with the current "public policy of repression and punishment," she urged policies that were concerned not only with the "symptoms" of prostitution, but also with understanding and addressing its causes.<sup>135</sup>

At least some members of the medical community thought her plan had merit.<sup>136</sup> LaGuardia, however, failed to press for its adoption or call for the end of the Women's Court.<sup>137</sup> Rather, he continued down the road of high-

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urban-industrial world, progressive jurists constructed a new sociologically oriented jurisprudence that legitimated an expanded role for the state in investigating, policing, and ameliorating social conditions.").

130. Kross, *The New Plan*, *supra* note 126, at 4; *see also* Tilden Lynch, *supra* note 11 ("Early in 1935 Magistrate Kross completed her survey . . . . One of her recommendations was that the Women's Court be replaced by a commission to treat it as a medico-social problem, rather than criminal.").

131. *Social War*, *supra* note 25; *see also* *Would Abolish Women's Court*, N.Y. AMERICAN, June 8, 1936, at 2 (on file with the AJA).

132. Kross, *New Plan*, *supra* note 126, at 13-14 (indicating that the tribunal's powers would not be dissimilar or greater than those of boards that reviewed Workmen's Compensation claims).

133. *Id.* at 7-12. Kross's proposal failed to fully explain when and how detention would be used.

134. *Id.* at 15-16; *see also* *Social War*, *supra* note 25.

135. *Id.*; *see also* *Would Abolish Women's Court*, *supra* note 131.

136. Harry J. Benjamin, *Prostitution: In Some of Its Medico-Psychological Aspects and an Attempt at its Practical Solution*, MED. REV. REVS., Sept. 1935, at 21 (on file with the AJA) (Benjamin believed Moscowitz Kross's recommendations for a "new technique" to deal with prostitution, outlined in a March 9, 1935 New York Times article, were "progressive.").

137. *See, e.g.*, Paper by Magistrate Kross Presented to the Regional Conference on Social Hygiene 6 (Feb. 5, 1941) [hereinafter Paper by Magistrate Kross] (on file with the AJA); Statement by Magistrate Kross Given Out at the Women's Court 4 (June 6, 1936)

profile investigations, with particular concern for organized crime.<sup>138</sup> Indeed, with LaGuardia's support, Special Prosecutor Thomas Dewey gathered evidence and successfully prosecuted "Lucky Luciano," a well-known gangster, in June 1936, for running highly-controlled prostitution rings within the city.<sup>139</sup> Dewey was praised for his actions, and LaGuardia claimed credit for working to clean up vice in the city.<sup>140</sup>

On the morning of Saturday, June 6, 1936, the day after all evidence in the Luciano trial had been presented, Kross distributed a written statement to those present in the Women's Court, addressing the wastefulness of the trial and calling for more meaningful reform.<sup>141</sup> The scathing five-page statement indicated:

The current vice investigation, with its subsequent trials of Charles Luciano and his associates was characterized today by Magistrate Anna M. Kross as "another[r] futile and costly scavenging expedition which will have [little if any] effect whatever upon the absurdity, ineffectuality and injustice of New York City's treatment of the problem of prostitution."

In an inte[r]view at the Women's Court, where she has been sitting during the last two weeks, Magistrate Kross declared that "The Dewey Investigation has accomplished only one thing, it has demonstrated once more the stupidity of handling a social question by criminal-legal procedures."<sup>142</sup>

Admonishing the fact that "politically inspired" investigations and "vice crusade[s]" had become too regular a part of the "civic scene," Kross warned that "[b]y making prostitution contraband we create the vice exploiter, the shady lawyer and bondsman, the corrupt policeman and official, just as liquor prohibition created the bootlegger and those who protected him."<sup>143</sup>

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[hereinafter Statement by Magistrate Kross] (on file with the AJA).

138. JEFFERS, *supra* note 2881, at 202-10. LaGuardia was similarly interested in stamping out gambling, which he also attributed to New York's underworld. Kross eventually spoke out against prosecuting gambling cases in specialized criminal courts. *See infra* note 149.

139. JEFFERS, *supra* note 28, at 202-10 (Luciano received a sentence of thirty to fifty years); *see also* MURTAGH & HARRIS, *supra* note 20, at 241-43.

140. JEFFERS, *supra* note 28, at 208-10.

141. Statement by Magistrate Kross, *supra* note 137, at 1-5.

142. *Id.* at 1.

143. *Id.* Kross insisted that money used for trials and investigations should instead be used for services like "clinical and hospital facilities for the treatment of venereal disease." *Id.* at 3. She further noted that "[a] million dollars went for the Seabury investigation only four years ago. [It] dramatically revealed the extent of the abuses that have grown out of our handling of the prostitution question. It revealed injustice and corruption . . . [but]

Addressing her own reform efforts, Kross recounted that she had fought against the problems presented by the Women's Court "since [it] was founded," adding:

Over a year ago I submitted to the Mayor, at his request, a plan for a new procedure for handling the question of prostitution in New York City . . . . The Mayor appointed a committee to consider this plan and other plans which were suggested. It has submitted no report, approved or disapproved no plan. We have merely drifted along into a new vice-investigation.<sup>144</sup>

Clearly frustrated by LaGuardia's failure to adopt her proposal, Kross did her best to ameliorate the situation by employing novel procedures within the existing Magistrates' Court,<sup>145</sup> including developing a social-work-based court docket in 1936 called the Wayward Minors' Court for Girls.<sup>146</sup> This institution, a subpart of the regular Women's Court, dealt with women between the age of sixteen and twenty-one who ordinarily would have been processed with adult female defendants.<sup>147</sup> In 1938,

[n]othing has changed at all except a few faces on the vice squad and in the Women's Court." *Id.*

144. *Id.* at 4. Kross also recounted that a house raid once brought five prostitutes before her—four had counsel; the fifth did not because she "presumably had fallen behind in her weekly payments." *Id.* She went on:

A girl who was before me this week, had just completed two years in prison for prostitution and had been rearrested three weeks after her release, for soliciting on the streets. "What would you have done," she asked me, "if you were just out of jail, broke, and no place to go to?" If we are going to do something about prostitution in New York City, here is where we must do it: We must help to rehabilitate to readjust the woman who has become a prostitute. Whether Luciano and his associates go to jail or not is immaterial as far as solving this problem is concerned.

*Id.*

145. In addition, shortly after Luciano was convicted, Kross organized a group of volunteer, lay advocates, known as the Magistrates' Court Social Service Bureau, to provide assistance to the women processed in the Women's Court. Synopsis by A.Y. Yeghenian, Executive Director of the Social Service Bureau, History and Progress of Magistrates' Courts Social Service Bureau: 1935 to Date 1 (Oct. 1, 1940) (on file with the AJA). Although seen as somewhat controversial because it was a public-private collaboration within the court system, LaGuardia was supportive of this less radical reform of the Women's Court. See Tilden Lynch, *supra* note 11 ("With Mayor LaGuardia's sanction and co-operation [Moscowitz Kross] organized the Magistrates' Court Social Service Bureau as an adjunct of [the Women's Court]."); see also Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 451 (1938) [hereinafter Kross & Grossman, *Suggested Improvements*] (indicating that the "Magistrates' Courts Social Service Bureau has been the subject of severe but unjust criticism").

146. ANNA M. KROSS, U.S. WORKS PROGRESS ADMIN., PROCEDURES FOR DEALING WITH WAYWARD MINORS IN NEW YORK CITY 23, 26 (1936).

147. Kross & Grossman, *Suggested Improvements*, *supra* note 145, at 439 (noting that on

Kross also attempted to cut short her tenure on the Magistrates' Court by running, unsuccessfully, for a judgeship in the First Department of the New York Supreme Court.<sup>148</sup>

LaGuardia supported Kross in her Supreme Court campaign but, after she lost, reappointed her in 1940 to an additional ten-year term on the Magistrate's Court.<sup>149</sup> Kross accepted the appointment and continued her reforms within the Magistrates' Court system.<sup>150</sup> Throughout this period, however, she persisted in calling for an end to the Women's Court.

In a detailed, three-part series published in the *Brooklyn Law Review*,

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March 2, 1936, an order of the chief magistrate allowed for the creation of the Wayward Minors' Court for Girls); see also Tilden Lynch, *supra* note 11 ("In 1936 Magistrate Kross organized the Wayward Minors' Court to deal with incorrigible girls . . . . She presided over this experiment for more than a year.").

148. See *Backs Magistrate Kross; The Democratic Junior League Favors Her for Justice*, N.Y. TIMES, Sept. 15, 1938, at 17; Tilden Lynch, *supra* note 11; see also *Courts Held Basis of All Democracy*, N.Y. TIMES, Sept. 23, 1938, at 12 (addressing a professional women's group during her Supreme Court campaign, Kross stated: "We are suffering from legal indigestion and it is time women had a chance to offer some remedies."); *Whitman*, *supra* note 10, at 49. Despite her earlier work with the Democratic Party, see *supra* note 105, Kross apparently did not receive its endorsement and ran for the Supreme Court seat on the American Labor, Socialist, and Progressive Party tickets. See *Short Biographies of Candidates Who Will Be Voted Upon Here Tuesday*, N.Y. TIMES, Nov. 5, 1938, at 8. She received support in her run from left-leaning groups like the National Lawyers Guild. *Mrs. Kross Approved By Lawyers Guild*, N.Y. TIMES, Nov. 5, 1938, at 7.

149. See *Whitman*, *supra* note 10, at 49 (LaGuardia referred to Kross as "a breath of wholesome fresh air" during her Supreme Court run); see also *Mayor Condemns 'Political' Judges*, N.Y. TIMES, Nov. 6, 1938, at 42 (Mayor LaGuardia endorsed Kross's candidacy for the First Department of Supreme Court). Over time, however, tensions continued to grow between LaGuardia and Kross, in part because of her independence and criticisms of LaGuardia. See *Whitman*, *supra* note 10, at 49; see also CHARLES GARRETT, *THE LAGUARDIA YEARS, MACHINE AND REFORM POLITICS IN NEW YORK CITY* 161 (1961) ("So zealous . . . was LaGuardia in his attack on gambling that he sometimes invaded the personal rights of individuals, causing annoyance; once after the police had raided a private poker party, Magistrate Anna Kross chided them severely for 'lawless law enforcement'.").

150. In addition to the Wayward Minors' Court, Kross went on to develop and help run other specialized criminal court parts within the Magistrates' Court system, including the Home Term Court, which dealt with domestic violence prosecutions, and the Social Court for Men, intended to assist low-level offenders who continually reentered the criminal justice system because of underlying problems such as alcoholism. I contend that the creation of these experimental criminal court venues, which focused on the "root causes" of what brought defendants into the system, rather than specific criminal charges, represented the "original" problem-solving court movement. See Mae C. Quinn, *New York's Original Problem-Solving Court Movement*, *supra* note 129. Indeed, it is remarkable that today's court "innovators," who lay claim to creating something entirely new in drug treatment courts, domestic violence courts, and the like, have failed to specifically acknowledge Kross's groundbreaking court innovation work, which predated their efforts by nearly half of a century. *Id.* Perhaps more significant, however, is that it appears they have not attempted to learn from the lessons provided by Kross's well-intentioned but generally short-lived experiments in social problem-solving through specialized criminal courts. *Id.*

Kross and co-author Harold M. Grossman chronicled the history and jurisdiction of New York City's Magistrates' Courts, offering suggestions to improve the system.<sup>151</sup> They wrote:

When the Women's Court was first established, its sponsors hoped that it would become an instrument of real service in handling the problem of prostitution, in checking venereal disease, and in the rehabilitation of offenders brought before it. A survey of its work . . . however, demonstrates that it has neither solved the problem of prostitution nor checked venereal diseases. It is true that some of the flagrant outward manifestations of prostitution have disappeared. New York City no longer has segregated "red light districts," "parlour houses," or brothels. Numerically, however, prostitution is as prevalent today as it was before the advent of the Women's Court.<sup>152</sup>

Throughout the years, "[t]he pendulum ha[d] swung from one extreme to another, from total indifference [towards prostitution] to fanatical attempts of suppression."<sup>153</sup> And suppression efforts, controlled by police and criminal courts, Kross and Grossman argued, were ineffective and problematic.<sup>154</sup> They submitted, however, that it was for "[t]he church, the home, and the schools . . . to carry, as they have always carried, the responsibility for teaching public and private morality."<sup>155</sup> Thus, Kross and Grossman again pressed for abolition of the Women's Court<sup>156</sup> and for creation of "an informal commission" that would utilize a "scientific medical social approach" towards prostitutes, which would focus on

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151. See generally Kross & Grossman, *History and Organization*, *supra* note 20; Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Jurisdiction, Powers & Duties of Magistrates*, 7 BROOK. L. REV. 295 (1938) [hereinafter Kross & Grossman, *Jurisdiction, Powers & Duties*]; Kross & Grossman, *Suggested Improvements*, *supra* note 145.

152. Kross & Grossman, *Suggested Improvements*, *supra* note 145, at 444.

153. *Id.* at 446.

154. *Id.* They argued, "[t]he very nature of the police method of handing [prostitution] breeds corruption and contempt for our laws and our courts, and the benefits to the community are accordingly negligible." *Id.* Moreover, "[t]o determine whether the plainclothesman said 'hello' first, or whether the woman did, whether she exposed her person or not, is not worthy of the dignity of the judicial robe and is certainly not an attack upon the roots of the evil." *Id.*

155. *Id.* at 448. They compared the criminalization of prostitution to the "experiment of prohibition," arguing that because "private morals of individuals are not the concern of government . . . all efforts to make people virtuous by law have been ever doomed to failure." *Id.* at 447-48.

156. *Id.* at 443-44 ("The Women's Court should be abolished. Non-prostitutional offenders should be arraigned in the district courts and prostitutes themselves should not be prosecuted criminally in the first instance. To the extent that public solicitation is an actual, not fanciful, breach of public order and decency, it should be handled like any other such breach, and the defendant charged with disorderly conduct.").

“voluntary cooperation” with treatment and rehabilitation rather than “compulsory correction.”<sup>157</sup>

During the 1940s, while Kross focused on new court programs she created within the Magistrates’ system,<sup>158</sup> little changed within the larger structure of the Women’s Court. Indeed, its workings continued to be scrutinized.<sup>159</sup> Ultimately, in 1950, Democratic Mayor William O’Dwyer named John M. Murtagh as the new Chief Magistrate Judge, a position that involved oversight of the Women’s Court.<sup>160</sup> O’Dwyer’s successor, Mayor Robert Wagner, elevated Kross to the post of Commissioner of New York City’s Department of Corrections in 1953, resulting in her departure from the Magistrates’ Court.<sup>161</sup>

As Chief Magistrate, Murtagh echoed Kross’s nearly four-decade long critique of the Women’s Court.<sup>162</sup> Indeed, in a 1957 presentation published

157. *Id.* at 447-49; *see also supra* note 37.

158. *See supra* note 150. During this decade, Kross continued to call for an end to the Women’s Court. For instance, in a 1941 presentation to the Regional Conference on Social Hygiene, Kross again railed against the criminal prosecution of prostitutes. Paper by Magistrate Kross, *supra* note 137, at 1. Although she noted that some changes, like her Wayward Minors’ Court for Girls, had improved the system, she warned that such modifications were “superficial” and “entirely inadequate.” *Id.* at 7. The “vicious circle of arrest, sentence, medical examination, conviction, detention, [and] discharge make the rounds,” Kross explained, yet prostitutes “and society are exactly as they were before.” *Id.* at 1. Thus, Kross contended, “I, therefore, still stand by my recommendations made to the Mayor . . . in 1935 that the most important change needing to be accomplished is ABOLITION OF THE WOMEN’S COURT.” *Id.* at 7 (emphasis in original).

159. *Court Bribe Charges Termed Unfounded; Herlands Report Says Women’s Allegations Have Been Retracted*, N.Y. TIMES, Aug. 3, 1942, at 15; *Women’s Court Data Held Unconvincing; Committee Believes Arrests No True Index to Conditions*, N.Y. TIMES, July 22, 1942, at 11; *see Solomon, supra* note 23, at 11-12 (At the direction of LaGuardia, William B. Herlands, New York City’s Commissioner of Investigation undertook a “study of the handling of prostitution cases in the Magistrate’s Court”); *see also* MURTAGH & HARRIS, *supra* note 20, at 244.

160. Tom Goldstein, *Murtagh’s 40-Year Public Life Was Marked by Stormy Cases*, N.Y. TIMES, Jan. 14, 1976, at 14. O’Dwyer left office shortly thereafter with an appointment to serve as an ambassador to Mexico. *See* CONNABLE & SILBERFARB, *supra* note 20, at 317.

161. *See id.* (noting that Kross’s appointment by Wagner in 1953 surprised some because of her obvious qualifications for the position, and the seeming lack of patronage in the selection). Kross appears to have been only the second woman to hold that position. *See* Thomas C. McCarthy, *Correction Connections: 3 First Ladies: KBD, AMK & Mrs. FDR*, in 2003 WOMEN’S HISTORY MONTH FEATURE ARTICLES, available at <http://www.correctionhistory.org/html/chronicl/amk/3firstladies.html> (last visited Feb. 11, 2006) (noting that in 1914 Katherine Bement Davis was appointed by Mayor John Purroy Mitchel to lead the City’s Department of Corrections, making her the first woman to hold that position).

162. *See, e.g., Murtagh Asks End of Women’s Court*, N.Y. TIMES, July 27, 1951, at 19; *see also Solomon, supra* note 23, at 12 (“By 1955 Chief City Magistrate John M. Murtagh would emerge as one of the most forceful advocates of the abolition of the New York City Women’s Court in light of its, and the criminal law’s, demonstrated inability to solve the

in New York's *Correction* magazine, and his book of the same year, *CAST THE FIRST STONE*, he offered some nearly identical observations.<sup>163</sup> Like Kross, he argued it was the responsibility of "the church, the home and the schools," not the courts, to teach morals.<sup>164</sup> Further, he recommended the removal of prostitution from the criminal system and the "eventual" abandonment of the Women's Court as an institution.<sup>165</sup> Despite the continued delivery of Kross's message, it was not until 1967 that New York City's Women's Court, amid further controversy, finally ceased operation.

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social problem of prostitution."); *New Name Is Given to Women's Court*, N.Y. TIMES, Apr. 6, 1953, at 10. During this same period, Murtagh also celebrated the work of the Women's Court. In one article he referred to it as a "highly important" "social court," and compared it to other specialized, problem-solving venues like Kross's Home Term Court, which had "made possible the integration, into the machinery of criminal justice, of modern scientific methods for the better understanding of the motives and forces that bring the individual into conflict with the law." See John M. Murtagh, *Functions of the Magistrates' Courts*, BAR BULL., Mar. 1953, at 173-75. He went on to claim:

Once the subject of considerable public and professional censure, because of corruption on the part of prosecutor, police, bondsmen and private counsel, this court, during recent years has passed through a series of reforms—the elimination of unscrupulous bondsmen, the disappearance of questionable members of the bar and the representation of the majority of defendants by the Legal Aid Society, also the improvement of procedures designed to provide speedy and fair trials, and advances in the treatment of venereal disease. The public is now excluded from Women's Court. Probation services have been expanded and intensified, and outside social agencies now come in and assist in the work of diagnosis and rehabilitation. Yet, Women's Court is still unable to attain all of its objectives because, like all our social courts, it lacks adequate probation and psychiatric facilities and because the city, which fails to heed repeated demands for such services, also fails to provide modern correctional institutions.

*Id.* at 175.

163. MURTAGH & HARRIS, *supra* note 20, at 4.

164. *Id.* at 4-5.

165. *Id.* at 5. Murtagh also submitted, using nearly the same words Kross had used in her 1938 Brooklyn Law Review article, that: "[t]o determine whether the arresting officer said 'hello' first, or whether the women did, whether she exposed her person or not—is not worthy of the dignity of the judicial robe and is certainly not an attack on the roots of the evil." *Id.* at 4-5. According to at least one press account, after Murtagh's 1957 book about prostitution, *CAST THE FIRST STONE*, was released, Kross publicly accused him of stealing from her 1935 report to LaGuardia and using it as the "basis" for the book. *Mrs. Kross Aims Fire at Judges, Jury*, N.Y. WORLD TELEGRAM & SUN, Mar. 30, 1959, at 1. Murtagh apparently denied the allegation, claiming Kross was "flatter[ing]" herself as their ideas on prostitution were quite different and, in many respects, hers were "naïve." *Id.* In the end, Kross reportedly retreated from her initial claim, indicating, "To say that I said he stole my report is ridiculous. He didn't have to steal it. It is a public document that I have used 101 times." *Id.*



### D. The Women's Court Closes Its Doors

In 1962, Governor Nelson Rockefeller oversaw a statewide restructuring of New York's courts that created a new "Unified Court System." As a result, New York City's local Magistrates Courts were abolished and replaced by a city wide criminal court system.<sup>166</sup> The Women's Court continued operations under the auspices of the Criminal Court.<sup>167</sup>

Three years later, Rockefeller approved the revision of New York's Penal Laws, resulting in significant prostitution law changes.<sup>168</sup> While widening the net to allow prosecution of customers as well as prostitutes, effective September 1967, it reduced the maximum penalty for all prostitution-related offenses from one year of incarceration to fifteen days in jail.<sup>169</sup>

In May of 1967, a few months before patron prosecutions and lesser penalties were to take effect, New York City Police Commissioner, Howard H. Leary, announced that representatives of the Police Department

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166. N.Y. CONST., art. VI, § 1; N.Y. JUD. LAW § 212 (McKinney 1968); *see generally* Barbara Botein, *Court Reorganization in New York: The Role of Bernard Botein, 1958-73*, 3 JUST. SYST. J. 126 (1977); *see also* Douglas Dales, *Reform of Courts Signed Into Law By Rockefeller*, N.Y. TIMES, Apr. 26, 1962, at 1; *New Court Set-Up has a Slow Start*, N.Y. TIMES, Sept. 5, 1962, at 32; Jack Roth, *New Court Setup Stirs Grumbling*, N.Y. TIMES, Oct. 8, 1963, at 45.

167. *See Prostitute Cases Go Unprosecuted*, *supra* note 104 (explaining that the Women's Court, which had existed for fifty-seven years in the Magistrates' Court, had been moved to the Criminal Court system); *see also* Solomon, *supra* note 23, at 8 (noting that the Women's Court, which had been run as part of the City Magistrates' system, ultimately became "Part 9" of the City's Criminal Court and citing Pamela A. Roby, *Politics and Criminal Law: Revision of the New York State Penal Law on Prostitution*, 17 SOC. PROBS. 83, 93 (1969)).

168. *See* Roby, *supra* note 167, at 84 (1969) ("The 1965 Penal Law represents a complete reorganization of the 1864 New York State Field Commission Revised Code of Criminal Procedure which became effective in 1881 and was amended in 1909."); *see also* John Sibley, *Governor Signs New Penal Law*, N.Y. TIMES, Jul. 23, 1965, at 1, 32. According to Roby, the new prostitution provisions were among the most controversial modifications of the Penal Law, involving public hearings and considerable vetting of draft versions of the new statutes. Roby, *supra* note 167, at 87-93. Interestingly, the Commission appointed by Rockefeller to revise Penal Law consulted with Murtagh, who by that time had become the administrative judge in New York City's Criminal Court, with regard to updating the prostitution statutes. *Id.* at 87-89; *see also* Goldstein, *supra* note 160 (recounting that Murtagh left the Magistrates' Court in 1960 when appointed as Chief Justice of the Court of Special Session, and that two years later he became the new citywide Criminal Court Administrative Judge).

169. *See* Roby, *supra* note 167, at 87-90 (noting that the new Penal Law prohibited patronizing a prostitute, which became punishable as a "violation," and also "made prostitution a 'violation' rather than a crime, the maximum sentence for a violation being fifteen days in jail rather than a year in jail or three years in a reformatory"); *see also* J. Anthony Lukas, *City Revising Its Prostitution Controls*, N.Y. TIMES, Aug. 14, 1967, at 1, 24; Sibley, *supra* note 8, at 32.

would no longer serve as prosecutors in the Women's Court.<sup>170</sup> Manhattan District Attorney Frank S. Hogan, whose office was already understaffed, responded that his attorneys were not in a position to run the Women's Court.<sup>171</sup> He agreed, however, that prostitution cases could be "referred to a part of Criminal Court where he had an assistant on duty."<sup>172</sup> Thereafter, in mid-September of 1967, a year after Kross retired as Commissioner of Corrections,<sup>173</sup> Kross's request was finally fulfilled—the New York City Women's Court was abolished.<sup>174</sup>

### III. THE MIDTOWN COMMUNITY COURT

In 1969, two years after the Women's Court closed, prostitution was again classified as a misdemeanor, as opposed to a mere violation of law.<sup>175</sup> Until recently, such alleged crimes continued to be prosecuted in

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170. *Leary Changes the Rules*, *supra* note 104 (recounting that police had served as prosecutors in the Women's Court since the time of the Seabury Inquiry, which had uncovered corruption on the part of the District Attorney's Office); *Prostitute Cases Go Unprosecuted*, *supra* note 104 (claiming that the practice was "not in the best interest of sound administration of criminal justice in our city," Police Commissioner Leary announced that beginning May 15, 1967, the department's legal bureau would no longer prosecute charges of prostitution).

171. *Id.*

172. *Id.*

173. Kross served as Commissioner of Corrections until 1966 and died in 1979 at age eighty-eight. See Joan Cook, *Anna M. Kross Dies: An Ex-City Official*, N.Y. TIMES, Aug. 29, 1979, at D19. Her obituary noted that during her life, Kross "generated storms of publicity for her outspoken manner and independent ways." *Id.* Today, one of the City's correctional facilities on Rikers Island is named for Kross and commonly referred to "AMKC." *Id.*

174. See Jack Roth, *Judge Calls Women's Court in City a 'Peep Show'*, N.Y. TIMES, Sept. 9, 1967, at 33 ("On Sept. 18, Women's Court will be abolished and prostitution cases will be sent to other parts of the courts and tried by assistant district attorneys in the regular course of their duties."); see also Roby, *supra* note 167, at 93 n.45 ("Sept. 15, 1967 Part 9 of the Criminal Court, City Magistrates' Court, commonly called the 'Women's Court' was discontinued. Thereafter sexual offenses by women were handled in Part 1C."). Additional circumstances leading up to and following the abolition of the Women's Court in 1967 are well-documented in Roby's article, which chronicles tensions among police, the District Attorney's Office, Criminal Court judges, civil rights advocates, and community members. See Roby, *supra* note 167, at 93-100. For instance, at the outset of the summer of 1967, police cut back on prostitution arrests. *Id.* at 93-94. Thereafter, Midtown Manhattan businessmen and others complained about an influx of prostitutes in the area. *Id.* Police responded with a crackdown, sweeping streets of hundreds of women believed to be selling sex and charging them with disorderly conduct or loitering with intent to commit a crime. *Id.* at 94-95. Ultimately, however, many of the cases were dismissed, in part because the offense of prostitution had been changed to a violation versus a crime. *Id.* at 94-97. Thus, one could not be guilty of loitering based upon intent to engage in prostitution. *Id.*

175. The legislature revisited the classification of prostitution, changing it from a non-crime to a class B misdemeanor in most instances. *Id.* at 86-87 n.14; see also N.Y. PENAL

New York City's general criminal courts with other misdemeanor crimes. During the past decade or so, the subject of prostitution has made a return to newspaper headlines, media accounts, and community conversations.<sup>176</sup> It is again stirring strong reaction from various segments of the public.<sup>177</sup> Despite the sordid history of the failed Women's Court experiment, court innovators have recently revisited the concept of specialized criminal courts as a method for addressing the reemerging "problem" of prostitution.<sup>178</sup> While some things have changed (for instance, both prostitutes and their customers are now being prosecuted for sex trade activities), many of the same issues that prompted Kross's criticism of the Women's Court exist in today's experimental court movement. Indeed, the Midtown Community Court, perhaps the earliest and most publicized modern "problem-solving" institution focusing on sex-trade activities, presents a stark example of how history is repeating itself.<sup>179</sup>

This Part examines the Midtown Community Court, a "problem-solving court" established in 1993 to address prostitution and other "quality of life" issues in midtown Manhattan. In describing the Midtown Community

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LAW § 230.00 (prostitution); 230.03 (patronizing a prostitute). Loitering for the purpose of engaging in prostitution remains punishable as a violation, unless the accused has previously been convicted of a related offense. See N.Y. PENAL LAW § 240.37.

176. See, e.g., David F. Ashton, *Law and Order—Portland Style*, E. COUNTY NEWS, Feb. 1, 2005 (discussing prostitution in the Portland area); Jeff Lennox, *Prostitution and Drug Use Common in Knoxville's "Hot Zone,"* July 25, 2005, <http://www.wate.com/global/story.asp?s=3654440&ClientType=Printable> (last visited Feb. 11, 2006); see also DOROTHY MCBRIDE STETSON, WOMEN'S RIGHTS IN THE USA; POLICY DEBATES AND GENDER ROLES 293 (2d ed. 1997) ("whenever prostitution has been on the public agenda since colonial times, it has stimulated an intense and conflictual debate"); Erin Gibbs Van Brunschot et al., *Images of Prostitution: The Prostitute and Print Media*, 10 WOMEN & CRIM. JUST. 47, 48 (1999) ("Our investigation of newspaper coverage of prostitution over the last fifteen years indicates that the nineteenth century construction of the prostitute (as the sign of problematic female sexuality in urban life) continues in the late twentieth century.").

177. See, e.g., Ashton, *supra* note 176 (complaining that "hookers walk free" in many Portland cases); Lennox, *supra* note 176; see also Ronald Weitzer, *Prostitution Control in America: Rethinking Public Policy*, 32 CRIME, L. & SOC. CHANGE 83 (1999) (describing a rise in contemporary neighborhood groups complaining about the visibility of prostitution, as opposed to viewing prostitution as morally improper).

178. See, e.g., Geri L. Dreiling, *New City Trick*, RIVER FRONT TIMES, Sept. 11, 2002 (recounting that a specialized criminal court in St. Louis, Missouri focuses on providing drug treatment to sex workers); Bill Harless, *New Prostitution Court Eyed*, NASHVILLE CITY PAPER, Oct. 12, 2004 (noting that the concept of a prostitution court is being discussed in Nashville, Tennessee); see also Henri E. Cauvin, *City's Prostitution Court Targets Defendants for Aid*, WASH. POST, May 15, 2003, at B2 (announcing the opening of a new prostitution docket in Washington, D.C. in June 2003). Although this author has been unable to find reports of the event, according to criminal defense practitioners in the District of Columbia, its prostitution court has already closed.

179. See *infra* note 264 (discussing the observations of Karl Baar and Freda F. Solomon).

Court, this Part highlights the economic and other driving forces behind the institution, the police crackdown it has encouraged, and the various “innovative” courtroom and sentencing practices it has employed. It further outlines the results of this recent attempt at prostitution-focused court experimentation, an effort that has largely failed to stop the practice of prostitution.

### A. Development of the Midtown Community Court

Similar to the Women’s Court, the Midtown Community Court was developed in response to the concerns of vocal New Yorkers who sought to suppress criminal activity in midtown Manhattan, an area that had come to be known for its “seedy” clubs and theaters, and where “scantily-clad” prostitutes openly walked the streets.<sup>180</sup> The movement began in 1991 when Gerald Schoenfeld, chairman of the Schubert theater organization, and Herbert Sturz, a real estate executive, met to discuss the negative impact of low-level street crime, like prostitution, on tourism in the Times Square area.<sup>181</sup> They came up with the idea of creating a specialized, neighborhood-based court to deal with local criminal issues.<sup>182</sup>

A court planning team including Robert G. M. Keating, the Administrative Judge for New York City’s Criminal Courts, and other “powerful players” rallied behind the idea.<sup>183</sup> The Times Square Business Improvement District (BID),<sup>184</sup> formed in 1992 to help improve conditions in the Midtown area, joined the effort along with the Schubert Foundation and additional private entities to help fund the project.<sup>185</sup> John Feinblatt, a

180. DAVID C. ANDERSON, NAT’L INST. JUST., IN NEW YORK CITY, A ‘COMMUNITY COURT’ AND A NEW LEGAL CULTURE 3-5 (1996) (hereinafter ANDERSON, NEW LEGAL CULTURE); see also Robert Victor Wolf, *New Strategies for an Old Profession: A Court and A Community Combat A Streetwalking Epidemic*, 22 JUST. SYS. J. 347, 347-48 (2001).

181. ANDERSON, NEW LEGAL CULTURE, *supra* note 180, at 3; MICHELE SVIRIDOFF ET AL., CTR. FOR CT. INNOVATION, DISPENSING JUSTICE LOCALLY: THE IMPACT, COSTS, AND BENEFITS OF THE MIDTOWN COMMUNITY COURT 12 (2002) [hereinafter SVIRIDOFF ET AL., IMPACT, COSTS, AND BENEFITS]. Sturz also was a former Deputy Mayor for Criminal Justice and on the City Planning Commission.

182. SVIRIDOFF ET AL., IMPACT, COSTS, AND BENEFITS, *supra* note 181, at 12.

183. ANDERSON, NEW LEGAL CULTURE, *supra* note 180, at 3-4; SVIRIDOFF ET AL., IMPACT, COSTS, AND BENEFITS, *supra* note 181, at 12.

184. Vivian S. Toy, *Further Restraint is Sought for Improvement Districts*, N.Y. TIMES, Nov. 12, 1997, at B3 (“Under a BID, property owners must pay a special tax that the city collects and the business district then uses to improve the area.”).

185. SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 12-13; Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH U. J. L. & POL’Y 63, 89-90 (2002). For instance, together, private foundations, corporations, and the city raised \$1.4 million for a renovated space for the court. ANDERSON, NEW LEGAL CULTURE, *supra* note 180, at 3-4. And, during its three-year demonstration stage, “funding

former Legal Aid lawyer and then Deputy Director of the Victim Services Agency, was “recruited” to “administer the project” through the Center for Court Innovation.<sup>186</sup>

The Midtown Community Court, building upon the drug-treatment court model, was intended to be a “problem-solving court.”<sup>187</sup> That is, its goal was to work with the Midtown community, including the neighborhoods of Hell’s Kitchen and Chelsea, to solve problems in the area.<sup>188</sup> To help set a specific “agenda” for the new criminal court, planners solicited input from community leaders and other residents within the court’s jurisdiction.<sup>189</sup>

One such individual was Barbara Feldt, the founding member of Residents Against Street Prostitution (RASP), a group that had “staged

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for the Court’s innovative features . . . came in roughly equal measure from the City of New York, the federal government, and the private sector.” SVIRIDOFF ET AL., IMPACT, COSTS, AND BENEFITS, *supra* note 181, at 8-2. Such “innovative programmatic and technological costs were estimated as a 1.3 million dollar annual addition to the standard costs of operating an arraignment part.” *Id.* at 8-3. Ultimately, corporate and other private monies for the court were passed through a private foundation called “Fund for the City of New York,” which was “launched by the Ford Foundation in 1968 with the mandate to improve the quality of life for all New Yorkers.” *Id.* at 8-4 (“The Fund served as the conduit through which corporate and other private sector contributions were put to use in the Midtown Community Court.”).

186. ANDERSON, NEW LEGAL CULTURE, *supra* note 180, at 3-4. Feinblatt, the former Director of the Center for Court Innovation, has been referred to as the “architect” of the Midtown Community Court. Thompson, *supra* note 185, at 85 n.127 (describing the Center for Court Innovation as “a public/private partnership that works to develop innovative court programs” and citing to the Center’s website: <http://www.courtinnovation.org>); see also Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 39 n.7 (2000-2001) [hereinafter Quinn, *Whose Team*] (describing this author’s prior work as a public defender and with the Center for Court Innovation).

187. JOHN FEINBLATT ET AL., CTR. FOR COURT INNOVATION, NEIGHBORHOOD JUSTICE 1, 3, 5, 6 (1998) (“Community courts are neighborhood-based courts that use the power of the justice system to solve local problems” and are thus considered “problem-solving courts”); see also Thompson, *supra* note 185, at 87-88 (“Community courts adopted many of the processes employed by drug courts.”). Cf. Quinn, *Whose Team*, *supra* note 186 (examining some of the legal and ethical concerns raised by drug treatment courts and the problem-solving court movement).

188. “The court’s jurisdiction sprawls across more than 350 blocks of Midtown Manhattan that include several diverse areas: the old West Side residential neighborhoods of Chelsea and Clinton (also known as Hell’s Kitchen), where gentrification has recently softened a rough blue-collar tradition; the historically seedy blocks around Times Square; the bustling garment district, home to Macy’s and other large department stores; the theater district invaded each night by upscale tourists, suburbanites, and limos full of local glitterati; and the shining office towers that sprang up along Broadway and Seventh Avenue during the 1980’s.” ANDERSON, NEW LEGAL CULTURE, *supra* note 180, at 5.

189. SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 12-13; *The Midtown Community Court Experiment: A Progress Report* (Midtown Community Court, A Project of the Fund for the City of New York, New York, N.Y.), at 4-5 (on file with author).

vocal demonstrations and called upon the police and the court system to take a more-aggressive stand against prostitution.”<sup>190</sup> Feldt apparently believed that the existing criminal court, located downtown, several miles away, treated prostitutes too leniently.<sup>191</sup> It often sentenced them to “time served”—the night or two defendants spent incarcerated while awaiting arraignment—which allowed them to quickly return to the community.<sup>192</sup> Feldt also claimed that the prevalence of sex trade activities in the area caused her to fear for her life.<sup>193</sup> She pointed out that “[i]f you have street prostitutes, you also have drug dealers and knives.”<sup>194</sup>

### B. The Midtown Community Court Opens Its Doors

Ironically, the Community Court, which handles arraignments and guilty pleas only,<sup>195</sup> came to be housed in one of the former Magistrates’ Courts in Midtown Manhattan.<sup>196</sup> The Court’s stated operational objectives, reportedly developed to respond to the Midtown community’s concerns, were to provide “swifter justice” and “visible justice,” to “encourage enforcement,” to “leverage[e] community resources,” and to deliver “community restitution.”<sup>197</sup> In this way, the court hoped to “change the revolving-door nature of misdemeanor criminal justice”<sup>198</sup> and apply the oft-cited “Broken Window” theory to low-level crime in Midtown so that it

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190. Wolf, *supra* note 180, at 349-50 (Feldt was “calling for a more-serious response to quality-of-life crime, and prostitution in particular.”).

191. *Id.*

192. *Id.*

193. *Id.* at 348; *see also* SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 12-13 n.1.

194. Wolf, *supra* note 180, at 348.

195. SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 8-11 (describing the court as an arraignment-only venue). Defendants wishing to contest the charges against them must request to have their case adjourned to the downtown court. FEINBLATT ET AL., *supra* note 187, at 4; SVIRIDOFF ET AL., CTR. FOR COURT INNOVATION, DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 6 (1997) [hereinafter SVIRIDOFF ET AL., IMPLEMENTATION AND EFFECTS]. Presumably, this results in further delay and detention for defendants.

196. SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 2, 13 (acknowledging that local courts previously existed, without describing full history).

197. SVIRIDOFF ET AL., IMPLEMENTATION AND EFFECTS, *supra* note 195, at 2; *see also* FEINBLATT ET AL., *supra* note 187, at 3 (“During the Court’s planning stages, local residents and merchants made it clear that they wanted the harm caused by misdemeanor crime to be acknowledged and restoration made. At the same time, they felt that restitution in the form of community service was not enough. Community members also encouraged the Court to have an impact on the lives of offenders, offering them help that could curb their criminal behavior.”).

198. Jan Hoffman, *A Manhattan Court Explores Service-Oriented Sentencing*, N.Y. TIMES, Nov. 27, 1993, at 22.

would not fester to destroy the “social fabric” of the community.<sup>199</sup>

In their attempt to “depart . . . from ‘business as usual’” in handling Midtown-based misdemeanor prosecutions, court planners also developed a number of “innovative” features within the specialty court.<sup>200</sup> One of these was the appointment of a Community Advisory Board “to keep the Court abreast of quality-of-life problems in the community; identify community service projects to address these problems; and assist in planning and provide feedback about the Court.”<sup>201</sup> According to one of the Court’s early reports, the “community” advisory group consisted of eight people.<sup>202</sup> Most of its members, unlike the area’s predominantly middle and working-class residents,<sup>203</sup> were influential individuals affiliated with the business or government.<sup>204</sup>

When the court finally opened in 1993, an electronic newsletter was sent to the Hell’s Kitchen community announcing that it had begun handling cases and inviting spectators to watch the proceedings.<sup>205</sup> Similar to invitations extended by the Women’s Court,<sup>206</sup> the online flyer noted that

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199. FEINBLATT ET AL., *supra* note 187, at 2. The Broken Windows theory, developed by James Q. Wilson and George Kelling in their essay, *Broken Windows: The Police and Neighborhood Safety*, suggests that if low-level crimes are not addressed, it will lead to further community disorder and more serious criminal activity. *Id.*

200. SVIRIDOFF ET AL., IMPLEMENTATION AND EFFECTS, *supra* note 195, at 2.

201. *Id.*; see also *Introducing: The Midtown Community Court*, NEWS FROM THE MIDTOWN COMMUNITY COURT, Fall 1993, available at <http://hellskitchen.net/Resource/mcc/aboutmcc.html> (last visited Feb. 14, 2005) (the “unique features” of the court include “the establishment of a Community Advisory Board”).

202. *The Midtown Community Court Experiment: A Progress Report*, *supra* note 189, at 15.

203. SVIRIDOFF, IMPACTS, COST, AND BENEFITS, *supra* note 181, at 13 n.1 (“Although it contains both pockets of poverty and pockets of affluence, the Midtown residential neighborhood is Manhattan’s closest approximation to a middle-class/working-class neighborhood.”).

204. *The Midtown Community Court Experiment: A Progress Report*, *supra* note 189, at 5, 15. The Advisory Committee members included the President of the Times Square Business Improvement District, the head of the Municipal Arts Society, an attorney with a prominent law firm, a law enforcement representative, and Judge Robert G. M. Keating. *Id.*; see also ANDERSON, NEW LEGAL CULTURE, *supra* note 180, at 11 (“Gretchen Dykstra, president of the Times Square BID, sits on the community court’s advisory committee. Each week, her organization provides work for 10 to 20 offenders sentenced to community service. While she only has praise for the court, she also makes clear the contribution of the BID’s own security and sanitation crews for reducing low-level crime and improving the quality of life.”). But see FEINBLATT ET AL., *supra* note 187, at 3 (claiming that “[l]ocal residents and merchants sit on a community advisory board that serves as the Court’s eyes and ears, identifying neighborhood trouble spots and proposing new community service projects”).

205. *Introducing: The Midtown Community Court*, *supra* note 201.

206. See *supra* note 49.

“[i]t’s fascinating to watch the arraignment process of arrests that were made in your local Precinct,” and that it “hoped [the] newsletter . . . motivated” residents “to take time to see the Court in session.”<sup>207</sup> Indeed, such visits were “highly encouraged.”<sup>208</sup> It went on to inform potential visitors of the court’s “no talking” rules, explain where the various institutional players would be located in the courtroom, and acknowledge that some regular court monitoring was already being conducted by RASP because prostitution was one of the “most common offenses” adjudicated in the court.<sup>209</sup>

The newsletter assured community members that unlike the downtown court, the Community Court would not be sentencing offenders to “time served.”<sup>210</sup> Rather, “[t]o deter recidivous crime” it would offer “varied community service and social service sentences to offenders” which would benefit the community.<sup>211</sup> Thus, it invited community members to notify the court of projects in the neighborhood that could form the basis of community service assignments, like painting over graffiti, sweeping streets, or gardening.<sup>212</sup>

Residents were also prompted by the newsletter to talk with local police officers who would be bringing defendants to the court.<sup>213</sup> Indeed, like the proponents of the Women’s Court, Midtown court planners sought to “encourage law enforcement efforts” in the Times Square area by providing officers with more information, for instance by sharing details about community service completion data for particular defendants and “regular feedback” on case outcomes.<sup>214</sup>

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207. *Introducing: The Midtown Community Court*, *supra* note 201, at 2-4.

208. *Id.* at 4.

209. *Id.* at 1-3.

210. *Id.* at 4 (“To deter recidivous crime, this Court does not sentence offenders to time served but offers varied community service and social service sentences to offenders which benefits the community and reduces a great amount of time and paperwork for the police.”).

211. *Id.*; *see also* FEINBLATT ET AL., *supra* note 187, at 3 (“Offenders are sentenced to pay back the community through work projects such as caring for street trees, removing graffiti, cleaning subway stations, and sorting cans and bottles for recycling. At the same time, whenever possible, the Court uses its legal leverage to link offenders to drug treatment, health care, education, job training, and other on-site social services to help them address their problems.”).

212. *Introducing: The Midtown Community Court*, *supra* note 201, at 2-4.

213. *Id.* at 3; *see also* *The Midtown Community Court Experiment: A Progress Report*, *supra* note 189, at 6 (“The Court’s physical presence in the community has fostered closer communication between the Court and another important community member: the police.”).

214. FEINBLATT ET AL., *supra* note 187, at 6-7; *see also* ANDERSON, *NEW LEGAL CULTURE*, *supra* note 180, at 7 (noting that the Midtown area’s community affairs police officer believed that the Community Court’s approach to prosecution, including greater information sharing, made it easier for him to arrest alleged prostitutes).



Thus, the Midtown Community Court has led a modern “assault on street prostitution” in Midtown Manhattan.<sup>215</sup> For the court’s part, it “deliver[s] a one-two punch” to sex workers arrested and brought before the bench.<sup>216</sup> As for the first strike against sex workers, the Midtown Court judge sentences them to perform community service terms, often to begin on the day of sentencing.<sup>217</sup> Thus, sex workers who may have been up for many hours, and then detained pending arraignment, are asked to step out of court and into their assigned community service task.<sup>218</sup> While performing such work, defendants are expected to wear “blue vests emblazoned with the Court’s name.”<sup>219</sup> Such garb reportedly is “not intended to publicly shame” offenders, “but to show the neighborhood that offenders are paying back the community for the damage they have done.”<sup>220</sup> Beyond this, the Court has instituted “a special evening community restitution project . . . just for prostitutes because such a shift makes it very difficult to walk the streets at night.”<sup>221</sup> In this way, those running the Court impede sex workers from returning to work and earning money.<sup>222</sup>

The second strike upon prostitutes is the mandated participation in social services programs, with a purported goal of helping them leave the sex

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215. Wolf, *supra* note 180, at 349.

216. *Id.* at 352 (the Court “insists on meaningful punishment by requiring community restitution, but also mandates social services”). It should be noted that unlike the Women’s Court, the Midtown Community Court handles the cases of both men and women involved in the sex trade. Both male prostitutes and men who are customers of prostitutes are prosecuted in the court. See, e.g., ROBIN CAMPBELL, CTR. FOR COURT INNOVATION, THERE ARE NO VICTIMLESS CRIMES: COMMUNITY IMPACT PANELS AT THE MIDTOWN COMMUNITY COURT 4-5 (2000) (recounting the use of Community Impact Panels to sanction “Johns”). The Court’s treatment of male prostitutes and prostitution patrons is largely beyond the scope of this paper.

217. Wolf, *supra* note 180, at 352; see also FEINBLATT ET AL., *supra* note 187, at 4 (“local prostitutes . . . tended to receive lengthy community service sentences at Midtown”).

218. See JUHU THUKRAL & MELISSA DITMORE, URBAN JUST. CTR., REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 15-16 (2003).

219. Wolf, *supra* note 180, at 352.

220. *Id.*; see also FEINBLATT ET AL., *supra* note 187, at 10 (having defendants wear blue vests while performing community service has “helped put a human face on crime” so that “[n]o longer can residents” and others “deal in abstractions or talk about offenders as a separate class of people,” which is “important groundwork for the Court’s problem-solving mission”); Hoffman, *supra* note 198, at 22 (“community service puts a face on a problem that people tend to objectify”).

221. *Id.* at 352. One sex worker, Rosie Cruz, who was sentenced to community service during the court’s first few weeks in operation apparently declared, “Making whores work? I got 49 convictions! You think stuffing envelopes for a few days is going to stop me?” *Id.*

222. Wolf, *supra* note 180, at 353-54.

trade.<sup>223</sup> According to Robert Victor Wolf of the Center for Court Innovation, “[p]rostitutes face a host of problems that make it hard for them to leave ‘the life’ even if they sincerely want to quit, including control by a pimp, lack of money, education, or job skills, addiction, and health problems.”<sup>224</sup> Thus, the social service component of sentences frequently includes participating in health education classes, drug treatment programs, and group counseling sessions that are run by the Community Court’s staff.<sup>225</sup>

Those prostitutes who do not successfully complete the mandated community and social service sentences face incarceration. Indeed, the Court’s community service coordinator has warned offenders that while they are completing community service hours, they “belong to the Court,” and that if they do not do the work, he will have a warrant issued and they will “go to jail.”<sup>226</sup> Individuals rearrested for prostitution after having received earlier “graduated sanctions” of increased community service and social service conditions are sent to jail, too. In fact, the Court seems proud of the fact that when it does impose incarcerative sentences for sex workers, jail terms are generally significantly longer than those imposed at the downtown court.<sup>227</sup>

The Court’s staff has also partnered directly with police to encourage more prostitutes to “escape ‘the life.’”<sup>228</sup> Its Street Outreach Services (SOS) program sends court-based social workers out with patrolling officers in an effort to engage sex workers and others who “might be arrested and be in the Court sooner or later.”<sup>229</sup> It is said that this

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223. *Id.* at 353.

224. *Id.* Wolf concedes, however, that some prostitutes do not wish to leave the sex trade but simply wish to continue. *Id.* (noting that “of course, many [prostitutes] are actively resistant to going straight”).

225. *Id.* at 352. Interestingly, while Wolf noted that what many “prostitutes who are motivated to change their lives need is . . . a safe place to live,” the extent to which the court actually provides sex workers with long-term housing is unclear. *Id.* at 351-52.

226. *Id.* at 354.

227. *Id.* at 352; SVIRIDOFF ET AL., IMPLEMENTATION AND EFFECTS, *supra* note 195, at 6 (“Although the Midtown Court handed out fewer jail sentences than the downtown court, Midtown jail sentences were typically longer than those downtown, particularly for . . . prostitution cases.”).

228. DAVID ANDERSON, CTR. FOR COURT INNOVATION, STREET OUTREACH SERVICES: A PARTNERSHIP BETWEEN POLICE AND THE MIDTOWN COMMUNITY COURT 3-5 (1998) [hereinafter ANDERSON, STREET OUTREACH SERVICES] (a “Best Practices” document disseminated by the Center for Court Innovation); *see also* Wolf, *supra* note 180, at 357.

229. ANDERSON, STREET OUTREACH SERVICES, *supra* note 228, at 3-5; *see also* FEINBLATT ET AL., *supra* note 187, at 8 (“The SOS teams scour the streets of Midtown, reaching out to the homeless, prostitutes, substance abusers, and others who have fallen between the cracks of traditional law enforcement and social service networks. The goal is

relationship helps police to begin to look at offenders as individuals in need of help, while social workers are provided with protection on the street.<sup>230</sup> However, the threat of arrest is also used as a “tool” to encourage individuals to participate in Court-run social services programs.<sup>231</sup> That is, while “police . . . typically use discretion not to make arrests during outreach,” it is clear to those approached by the outreach team that the officer can return later to make an arrest.<sup>232</sup>

In fact, throughout the 1990s, not dissimilar from the Women’s Court era, police applied “continual law enforcement pressure” in Midtown,<sup>233</sup> targeting prostitution with vice sweeps and undercover operations.<sup>234</sup> For instance, if it was reported that prostitution was on the rise in a particular location, police increased “enforcement,” or arrests, in that “hot spot” area.<sup>235</sup> In doing so, they were supported by about forty private public safety officers hired by the BID, who carried radios and could communicate directly with the officers.<sup>236</sup> However, sweeps and enhanced police operations, in some instances, likely ensnared innocent individuals.<sup>237</sup>

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to enroll these people in social services before they get in trouble with the law.”).

230. ANDERSON, STREET OUTREACH SERVICES, *supra* note 228, at 5.

231. *Id.* This kind of coercion “makes compliance go up.” *Id.* at 11.

232. *Id.* Moreover, it has been suggested that approaching a group of two or more individuals, one of whom might be receptive to the Court’s social services, the officer might ticket one person in order to allow the social worker the opportunity to engage the other. *Id.* at 8-9.

233. Wolf, *supra* note 180, at 350.

234. See THUKRAL & DITMORE, *supra* note 218, at 13-16 (describing police “anti-vice,” “quality of life” initiatives that were instituted under the administration of Mayor Rudolph Giuliani and continue during the leadership of Mayor Michael Bloomberg); see also Charlie Leduff, *Streetwalking Takes a New Turn and Travels by Car*, N.Y. TIMES, Jan. 12, 1997, at CY8 (reporting that female officers pose as prostitutes in an attempt to arrest would-be customers); John Tierney, *The Big City: The Heedless City vs. a Topless Bar*, N.Y. TIMES, Dec. 10, 1998, at B3 (recounting that undercover officers attempted, unsuccessfully, to proposition female dancers in an adult night club, believing the women were prostitutes).

235. Wolf, *supra* note 180, at 357; see also SVIRIDOFF ET AL., IMPLEMENTATION AND EFFECTS, *supra* note 195, at 7 (“Together, ethnographic observations of local ‘hot spots’ interviews with offenders, analysis of arrest data, focus group interviews and interviews with local police, community leaders and residents pointed to substantial reductions in concentrations of prostitution and unlicensed vending.”).

236. Wolf, *supra* note 180, at 349-352; see also ROBERT R. WEIDNER, I WON’T DO MANHATTAN: CAUSES AND CONSEQUENCES OF A DECLINE IN STREET PROSTITUTION (Marilyn McShand & Frank P. Williams, III eds., 2001) (indicating that the BID’s forty “well-trained public safety officers” can radio police officers to make arrests).

237. See, e.g., THUKRAL & DITMORE, *supra* note 218, at 40-41 (“Sweeps may be prone to resulting in false arrests.”); Kit R. Roane, *Prostitution Still Thrives in the Shadows*, N.Y. TIMES, July 19, 1998, at 25 [hereinafter Roane, *Prostitution Still Thrives*] (one sex worker reports being “picked up for just walking down the street”); see also MICHAEL S. SCOTT,

After the Community Court opened for business, and police cracked down on prostitution in the area, sex trade activities in Midtown Manhattan did change. First, despite heightened law enforcement efforts, the number of prostitution arrests made in the neighborhood consistently and drastically declined.<sup>238</sup> For example, in 1992, the year before the court opened, police made 4364 prostitution-related arrests in the midtown area.<sup>239</sup> In 1993, after the court had operated only a few months, the number dropped to 3926.<sup>240</sup> By 1996, the number fell to 1893.<sup>241</sup> Second, while previously many female prostitutes could be seen, dressed in provocative clothing as they flagged down potential customers in passing cars, this kind of behavior was witnessed much less frequently by 1997.<sup>242</sup> Indeed, the “drastic reduction in the public presence” of sex trade activities was believed to be such a “triumph” that, in 1997, Barbara Feldt “disbanded” RASP, “declaring that street prostitution was no longer a problem in the neighborhood.”<sup>243</sup>

The practice of prostitution, however, has still very much continued.<sup>244</sup> According to a three hundred and sixty-four page report produced by the Center for Court Innovation, *Dispensing Justice Locally: The Impacts, Cost and Benefits of the Midtown Community Court*, when the institution began operations, three kinds of visible streetwalker “strolls” existed in the midtown area.<sup>245</sup> There was a high-level stroll for upscale, well-paid

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COMMUNITY ORIENTED POLICING SERVICES, U.S. DEPT. OF JUSTICE, THE BENEFITS AND CONSEQUENCES OF POLICE CRACKDOWNS 18 (2002) (describing the potential for abuse in police crackdown efforts, in part because of the pressure to make arrests).

238. SVIRIDOFF ET AL., IMPACTS, COST AND BENEFITS, *supra* note 181, at 4.12-4.15 (noting that there was a fifty-two percent decrease in prostitution arrests from 1993 to 1996).

239. *Id.* at 4.13.

240. *Id.*

241. *Id.*

242. Wolf, *supra* note 180, at 347-49.

243. *Id.* at 357 (noting that Feldt both resigned and ended the group).

244. See, e.g., Roane, *Prostitution Still Thrives*, *supra* note 237 (indicating that several brothels operate in the Midtown area, and revealing that some police officers were believed to be linked to one such establishment); Leduff, *supra* note 234 (recounting that sex “trade isn’t gone” from midtown, “[i]t has adapted,” in part by using rented cars to do business); Kit R. Roane, *Prostitutes on Wane in New York Streets But Take to Internet*, N.Y. TIMES, Feb. 23, 1998, at A1 [hereinafter Roane, *Prostitutes on Wane*] (reporting that although fewer prostitutes are seen on the streets, the sex trade industry is growing because sex workers have turned to the internet and escort services to find customers).

245. SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 4.1-4.2, 4.20-4.29. This report represents the second phase of a two-part project led by the Center for Court Innovation, which examines the implementation of the Community Court, its effects, and related issues. *Id.* at 1.1-1.2. The project’s first phase was discussed in an earlier report, which was later published as a book. See SVIRIDOFF ET AL., IMPLEMENTATION AND

prostitutes (fifty dollars or more per client) who were well-managed by pimps; a mid-level stroll of independent sex workers who sometimes used drugs and were paid less than high-level workers (twenty dollars or so per client); and a lower-level stroll consisting mainly of addicts who spent time in a local park and did whatever they could to feed their drug habit (often as low as five dollars per client).<sup>246</sup> After the court's first year-and-a-half in operation, only the sex workers from the lowest-level stroll "disappeared almost entirely" from the community.<sup>247</sup>

Although the mid-level and high-level strollers appeared to downsize between 1993 and 1997,<sup>248</sup> interviews with sex workers suggested that many of the women who worked those strolls had merely changed habits, behaving more discreetly and wearing casual clothing so as to blend in with other pedestrians.<sup>249</sup> Some strollers also began working out of cars, using pagers or, as they did during Kross's time, going "indoors" to work.<sup>250</sup> Mid- and high-level strollers did suffer economically, however, as there were fewer customers in the area and prices had become depressed.<sup>251</sup>

The sex workers who "disappeared" from the Midtown area may have merely migrated to other boroughs. According to the Center for Court Innovation's *Impacts, Cost, and Benefits* report, while the entire borough of Manhattan saw a twenty-one percent drop in prostitution-related arrests in 1994, other boroughs "witnessed a stark 47 percent increase."<sup>252</sup> The report goes on say this data suggests only "moderate spatial displacement [of prostitution] from Manhattan to other boroughs."<sup>253</sup> However, Robert

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EFFECTS, *supra* note 195. The second report was developed under a grant from the National Institute for Justice, United States Department of Justice, which was awarded to the Center for Court Innovation. SVIRIDOFF ET AL., *IMPACTS, COST, AND BENEFITS*, *supra* note 181, at vii. As discussed *infra* note 254, one of the report's authors, Robert Weidner, formerly served as a researcher for the Center for Court Innovation.

246. SVIRIDOFF ET AL., *IMPACTS, COST, AND BENEFITS*, *supra* note 181, at vii.

247. *Id.* at 4.2.

248. *Id.* at 4.2, 4.20-4.25, 4.28-4.29.

249. *Id.* at 4.21-4.22.

250. *Id.* at 4.2, 4.20-4.25, 4.28-4.29 (noting sex workers' shift from streetwalking to call girl services and the like).

251. *Id.* at 4.29; *see also* WEIDNER, *supra* note 236, at 110 (recounting that one sex worker claimed that while she previously could expect forty dollars for performing oral sex, she now received as little as twenty dollars).

252. SVIRIDOFF ET AL., *IMPACTS, COST, AND BENEFITS*, *supra* note 181, at 4.15-4.16. Specifically, while Manhattan-based arrests went from 4,938 to 3,913, the cumulative number for the other boroughs went from 3,830 to 5,618. *Id.*

253. *Id.* at 4.17. Similarly, Wolf claims that it reflects that "displacement . . . to other parts of the city has been minimal." Wolf, *supra* note 180, at 348. In their recent book, *GOOD COURTS*, Feinblatt and the new Director of the Center for Court Innovation, Greg Berman, declare

R. Weidner, the researcher who studied changes in sex worker behavior following the opening of the Community Court,<sup>254</sup> states that displacement of prostitutes to other boroughs and locations outside of the city has been “prevalent.”<sup>255</sup>

Indeed, Weidner believes that operation of the Community Court, in conjunction with increased law enforcement, resulted in “behavioral adaptations” that made prostitution “dramatically less obtrusive” in the area, but that these factors also made sex work more difficult and, in his opinion, “very few individuals actually left ‘the life’ as a result of the intervention.”<sup>256</sup> Although the Midtown Community Court and the crackdown it espoused may have improved the quality of life for some individuals in its catchment area, Weidner found “it had largely negative effects on the street prostitutes who it targeted without providing sufficient means for those who were entrenched in ‘the life’ to make meaningful life changes.”<sup>257</sup>

Similarly, a recent report by the Urban Justice Center examining prostitution in New York City noted that although the Midtown

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[The Community Court’s] common-sense approach—combining a message of accountability with a helping hand—has proven to be an effective one-two punch in Midtown. While the Court has not eliminated prostitution (it is, after all, the world’s oldest profession), it has made a dramatic impact on the streets. According to independent evaluators, prostitution arrests dropped 56 percent after the court opened.

GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS* 65 (2005) (citing SVIRIDOFF ET AL., *IMPLEMENTATION AND EFFECTS*, *supra* note 195). In doing so, they do not mention displacement as a possible cause for the purported reduction. *Id.*; see also Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 *HASTINGS L.J.* 851, 858 (1996-1997) (“In the court’s first eighteen months of operation, prostitution arrests dropped by fifty-six percent.”).

254. Weidner began studying prostitution trends for the Center for Court Innovation while a graduate student in criminology, and was a co-author of the three hundred and sixty-four page report designed to explain the impacts, costs, and benefits of the Midtown Community Court. See SVIRIDOFF ET AL., *IMPACTS, COST, AND BENEFITS*, *supra* note 181, at vi. Prior to the 2002 publication of that report, however, Weidner’s research served as the basis for his Ph.D. dissertation and book, *I WON’T DO MANHATTAN*.

255. WEIDNER, *supra* note 236, at 88; see also SCOTT, *supra* note 237, at 54-55 (confirming that Weidner’s research demonstrated “[i]ntensive enforcement of low-level offenses by patrol officers, combined with sanctions of the Midtown Community Court” resulted in “evidence of special displacement to outer boroughs,” as well as other displacement, but that “there was little evidence that many prostitutes quit the trade”).

256. WEIDNER, *supra* note 236, at 158; see also Roane, *Prostitutes on Wane*, *supra* note 244 (“many [prostitutes] still shiver nightly on the sidewalks in desolate stretches of the city . . . they are an increasingly beleaguered, often desperate group”).

257. SCOTT, *supra* note 237, at 163. Wolf claims that “it’s impossible to know for certain how many prostitutes have been persuaded to quit the business altogether” as a result of the Midtown Court. Wolf, *supra* note 180, at 355.

Community Court might cause sex workers to complete community service by day while having to work the streets at night, the Court's proponents have not "demonstrate[d] that their project prevents prostitution."<sup>258</sup> Indeed, simply pushing prostitutes away from Midtown may result in harm to them—causing them to work more dangerous areas, or resort to other illegal activities to replace lost income.<sup>259</sup> Thus, the Urban Justice Center warned that the Community Court model should not be seen as a "panacea" for prostitution.<sup>260</sup>

Nevertheless, Wolf asserts that as long as the "visible signs of prostitution in the neighborhood" have been reduced, "from the perspective of stakeholders in the Midtown Manhattan community, it almost doesn't matter" how many sex workers have left the trade because of the Community Court's work.<sup>261</sup> Moreover, consistent with the modern problem-solving court campaign, he has urged other jurisdictions to learn from and replicate the Midtown Community Court experiment, stating that "prostitution may be the world's oldest profession, but that doesn't mean citizens, communities, and governments cannot, with a concerted and well-planned strategy, do *something* about it."<sup>262</sup> Apparently heeding the optimistic call of reform agents like the Center for Court Innovation, other communities have begun to consider and create specialized criminal courts of their own so that they, too, can do "something" about the "problem" of prostitution in their areas.<sup>263</sup>

#### IV. REPEATING HISTORY'S MISTAKES: PROBLEMS PRESENTED BY SPECIALIZED CRIMINAL COURTS THAT SEEK TO SOLVE THE "PROBLEM" OF PROSTITUTION

To this point, I have described the New York City Women's Court, including Anna Moscovitz Kross's criticism of the institution, and the Midtown Community Court, two examples of specialized prostitution-focused criminal courts. As Carl Baar and Freda F. Solomon have already noted, there is an obvious and "uncanny parallel . . . between the community court movement in New York City and the New York City

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258. THUKRAL & DITMORE, *supra* note 218, at 16.

259. *Id.*; see also Roane, *Prostitutes on Wane*, *supra* note 244 (one prostitute, who has worked Hell's Kitchen and other areas of Manhattan for more than a decade, reports that she has "to move around a lot more and work more secluded places to get by, and you can't take as much time sizing up your customer. Things are tough on the street.").

260. THUKRAL & DITMORE, *supra* note 218, at 16.

261. Wolf, *supra* note 180, at 355.

262. *Id.* at 349 (emphasis added).

263. See *supra* note 178.

Women's Court."<sup>264</sup> The preceding accounts demonstrate that there are remarkable similarities between the extra-judicial impetus for creating these venues, the police methods they encouraged, their day-to-day operations, and their overall effect on the practice of prostitution. Thus, I believe that Anna Moscowitz Kross's well-founded criticisms of the Women's Court apply with equal force to the Midtown Community Court.

Indeed, in the following analysis of the courts' shared features, which builds upon Kross's critique, I suggest that prostitution-focused specialized courts are less problem-solving than problematic. Specifically, I contend that specialized criminal courts that may set out to address the "problem" of prostitution, in operation tend to encourage special interest control of criminal courts, foster undesirable police and judicial practices, and fail to meaningfully address societal problems. Moreover, creation and operation of such courts simply diverts attention from the real problem relating to prostitution—that is its continued criminalization.

### A. Capture of Criminal Courts

The establishment of both New York City Women's Court and the Midtown Community Court was driven largely by powerful citizens who sought to address societal problems, particularly prostitution. The Committee of Fourteen, in its various incarnations, was financially supported by Andrew Carnegie, John D. Rockefeller, and other prominent individuals.<sup>265</sup> Similarly, the influence and wealth of well-known business people connected to Times Square's tourism industry, including Gerald Schoenfeld, chairman of the Schubert Theater Foundation, and Gretchen Dykstra, President of the Times Square Business Improvement District, helped jump-start the Midtown Community Court.<sup>266</sup>

As Kross noted, while some motivations underlying the Women's Court movement may have been benevolent—for instance, wanting to protect young women from unfair treatment by police and others—overall, the Committee sought to use the institution to press its own agenda.<sup>267</sup> The

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264. Carl Baar & Freda F. Solomon, *The Role of Courts: The Two Faces of Justice*, 15 CT. MANAGER 19, 24 (2000) (discussing Solomon's 1987 unpublished work, which outlined the history and problems of the Women's Court, and comparing the Midtown Community Court to the Women's Court); see also *What the Data Shows*, 29 FORDHAM URB. L.J. 1828, 1832-33 (2002) (panel discussion that included remarks by Carl Baar recounting Solomon's work on the Women's Court debacle and warning that the community court model presented similar dangers).

265. See *supra* note 21 and accompanying text.

266. See *supra* notes 183-186, 200-204 and accompanying text.

267. Kross, History of the Women's Court, *supra* note 25, at 14; see also *supra* notes 75-76.



same can be said for the Midtown Community Court, which was criticized from the outset for receiving support from private donors who stood to gain from the institution's focus on street conditions, including strolling prostitutes, in Midtown Manhattan.<sup>268</sup> Even Manhattan's District Attorney, Robert Morgenthau, spoke out against the court, stating, "[I]t bothers me that people who can put up their own money and have influence can get their own court."<sup>269</sup>

Just as the Committee of Fourteen remained an active participant in the Women's Court to ensure follow-through on its moral reform and anti-prostitution campaign, Midtown's wealthy business interests have been closely involved in the work of the Community Court, raising serious questions about its mission and its priorities. For instance, although the Midtown Court claimed it would be responsive to concerns of the entire community, by 1997 the court's "key stakeholders"<sup>270</sup> agreed that "the priorities of the Midtown Community Court had shifted away from working in partnership with community resident organizations and residents themselves and toward partnerships with local law enforcement and the Times Square business community."<sup>271</sup> Some specifically complained that the interests and concerns of those living in the community were not being adequately represented by the Court's Community Advisory Board, which was described as "all lawyers, white, upper-middle-class and law-trained" and "not necessarily residents of local neighborhoods."<sup>272</sup> Moreover, the Community Advisory Board had "evolved from its original mission of involving organizations and residents into a kind of 'Board of Directors,'" which actually "set policy" for the Court.<sup>273</sup>

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268. Thompson, *supra* note 185, at 89-90 ("Funding appeared to come from the business community for the business community, raising fundamental questions about the altruistic rhetoric behind the court's establishment.").

269. Thompson, *supra* note 185, at 89-90 (citing Julie Brienza, *Community Courts Reach Out to Put a Dent in Petty Crime*, TRIAL, Mar. 1999, at 14).

270. See SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 6.10 (indicating that several rounds of interviews were conducted, beginning in 1993, with "12 individuals involved in or affected by the court's creation"). "Whenever possible the same representatives from the residential, commercial, and criminal justice communities were included [in the interviews]." *Id.* However, some "were conducted with individuals who were the successors to the officials included in previous panels who had by 1997 moved on to other positions." *Id.* at 6.1 n.1.

271. SVIRIDOFF ET AL., IMPACTS, COST, AND BENEFITS, *supra* note 181, at 6.9-6.10. Even those affiliated with the Court admitted that over time it had "change[d] in direction" and defined itself "as a participant in economic development and renovation efforts" in the midtown area, rather than its original purpose. *Id.* at 6.9-6.11.

272. *Id.* at 6.11.

273. *Id.* While a Community Advisory Board member and President of the Times Square BID, Gretchan Dykstra reportedly indicated that the BID and the Court "enjoy a symbiosis

Of course, as with the Women's Court where the Committee of Fourteen joined forces with other anti-prostitution groups,<sup>274</sup> some Midtown residents were aligned with the business sector, worked with the Community Court, and agreed with its policies. For example, Feldt, the vocal anti-prostitution activist who provided input at the court's inception, and whose group monitored court proceedings, was apparently pleased with the work of the Midtown Court. After all, with visible streetwalkers gone from her neighborhood, she was able to resign from her post as head of RASP and disband the group.<sup>275</sup>

Nevertheless, replicating the Women's Court model and permitting any private entity to shape the agenda of a criminal court is worrisome. This is true whether the entity is a wealthy business coalition or a vocal special interest group. Indeed, criminal courts, which often serve to uphold the rights of the accused,<sup>276</sup> are ill-suited venues for one private group or another to press its social vision or agenda. Criminal courts and their processes, at least in part, are intended to protect criminal defendants from the unfettered will of the public, which may very well be driven by personal prejudice, bias, religious beliefs, or the like.

Similarly, despite what others have suggested,<sup>277</sup> specialized, experimental criminal courts that, by their definition, seek to modify a social condition or resolve a societal problem, such as suppressing vice or improving a neighborhood's quality of life, seem unlikely to enhance the democratic experience. Rather, they appear to increase the possibility of

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that makes it hard to say which deserves credit for what." ANDERSON, *NEW LEGAL CULTURE*, *supra* note 180, at 11; *see also* Thomas J. Lueck, *Business Districts Grow, At Price of Accountability*, N.Y. TIMES, Nov. 20, 1994, at 1 ("And though their efforts have generally won broad praise, critics say that some [Business Improvement Districts] have grown too powerful and have taken over municipal duties without sufficient oversight or public accountability.").

274. *See supra* note 18 and accompanying text.

275. Wolf, *supra* note 180, at 357.

276. *See* JOSEPH G. COOK & PAUL MARCUS, *CRIMINAL PROCEDURE* 13-19 (4th ed. 1997) (discussing the application of federal and state constitutional standards to criminal prosecutions); JEROLD H. ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION* 26 (1994) (magistrates and trial judges in criminal cases "are given front line responsibility for administering" the standards established by Supreme Court rulings).

277. *See generally* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 389, 401 (1998) ("experimentalist courts serve democracy better not only because they presume to provide fewer definitive answers to legal, social, and ultimately political questions, but also because they can inquire into more of the political actors' own deliberative capacities"; "[f]or trial courts, experimentalism can transform the role of the judge from the traditional Anglo-American model of passive referee into an active problem solver, acting in cooperation with lawyers on the network of social problems and services in which legal problems are embedded.").

special interest capture of local courts.<sup>278</sup> In Midtown, it is all too clear that no thorough democratic process was used to decide what constituted a neighborhood “problem” in need of resolution.<sup>279</sup> And despite the best intentions of court reformers, whatever informal process might be made available runs the risk of being dominated by the most motivated or most vocal individuals in an area.<sup>280</sup> These views may not necessarily reflect those of the community at large.<sup>281</sup> Especially when it comes to the hot-button issue of prostitution, which intermittently has stirred strong and often unfounded<sup>282</sup> public reaction the need to ensure checks on special interest group involvement in the criminal process seems particularly acute.<sup>283</sup>

Moreover, quite different from civil litigation, where causes of action may be brought on behalf of a class of affected parties who seek to change some social condition, or where one of the litigants may be a governmental entity seeking to remedy a situation for the betterment of society, criminal matters involve the state, in the form of the local prosecutor, lodging claims against a single person. If the defendant is convicted, the law generally

278. See Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. REV. 359, 380-383 (2005); see also Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 944 (2003).

279. See Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1506-1507 (2003) (“No commentators have yet suggested a heuristic to decide which types of social problems and crimes are amenable to, or appropriate for, problem-solving courts”); Thompson, *supra* note 185, at 93 (asking if “are we expecting too much of judges if we charge them with resolving complex social problems through the criminal justice system”); see also William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 209 (2004) (“Legal Pragmatism” as reflected in drug court discourse, “has little to say about who has standing to participate in stakeholder negotiations and how the views of different participants are to be weighed in decision making”); cf. Lanni, *supra* note 278, at 396-98 (suggesting that utilization of grand juries to make charging and court policy decisions might be the best way to tap communities in the future to assist in criminal justice reform).

280. See *id.* at 380-381; Dorf & Fagan, *supra* note 279, at 944.

281. See Lanni, *supra* note 278, at 380-81 (noting that criminal justice efforts are often “dominated by homeowners and white residents in mixed areas”).

282. For instance, Feldt’s concerns about prostitutes bringing knives to the community, much less using them against her such that she needed to fear “for her life,” seems alarmist and without support; see also ARLENE CARMEN & HOWARD MOODY, *WORKING WOMEN: THE SUBTERRANEAN WORLD OF STREET PROSTITUTES* 39 (1985) (authors’ study found the “common myth” that all “prostitutes are junkies” to be untrue).

283. See Carlin Meyer, *Decriminalizing Prostitution*, 1 CARDOZO WOMEN’S L. J. 105, 117-18 (1993) (warning that those pressing for the prosecution of prostitutes may be “religious fundamentalists,” “social purity types,” or more conservative than a majority of the community); see also CARMEN & MOODY, *supra* note 282, at 15 (“We all know that our children see more immoral and obscene things, such as murder, rape, and racism, on the evening news than they could ever view walking on the ‘stroll’ in Times Square.”).

provides that she receive an appropriate sentence in light of the traditional goals of sentencing<sup>284</sup> and the specific facts and circumstances of her case.<sup>285</sup> Sentencing, therefore, is intended to hold an individual accountable for her individual conduct. The law generally does not saddle her with responsibility for the conduct of others, much less others' social conditions.<sup>286</sup> Accordingly, the role of the sentencing judge is quite unlike that of a judge involved in public law litigation where social reform may be mandated as a remedy.<sup>287</sup> In light of these well-recognized concepts, to permit non-party special interest groups to advance broad-based social change on the backs of individual criminal defendants seems wholly inappropriate and well outside of the accepted role of the criminal court system.<sup>288</sup>

284. See COOK & MARCUS, *supra* note 276, at 2 (discussing goals underlying the criminal process, including punishment, rehabilitation, deterrence, and protection of the public).

285. See ISRAEL ET AL., *supra* note 276, at 32 (sentencing policy has shifted away from the punishment fitting the crime to the punishment fitting the individual criminal).

286. See *id.* at 663-94 (discussing accomplice liability and its limits).

287. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing the shift in traditional civil litigation to the public law litigation model, which involves amorphous party structures, such as class actions, increased use of equitable relief, active involvement of the trial judge in fact development and evaluation, and relief in the form of decree that "provides for a complex, on-going regime of performance rather than a simple, one-shot, one-way transfer"); Quinn, *Whose Team*, *supra* note 186, at 46 n.59 (describing how judges in problem-solving courts have become similar to those in the public-law litigation context); cf. Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L. SCH. L. REV. 915, 932-936 (2004-2005) (warning that in the context of institutional reform, there is a danger that litigation courts may assist a particular group in pursuing social aspirations rather than enforcing rights).

288. See *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985) ("Central to our system of values and implicit in the requirement of individualized sentencing is the categorical imperative that no person may be used merely as an instrument of social policy, that human beings are to be treated not simply as means to a social end like deterrence, but also—and always—as ends in themselves."); see also Robert P. Mosteller, *The United States Perspective on the Judicial Role in Sentencing: A Story of Small Victories and a Call for Partial Solutions in a Difficult Environment*, in THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS (Sean Doran & John D. Jackson eds., 2000) ("A constant danger in the development of the victims rights movement is its potential to move from an effort to enhance participatory rights to one that focuses on and results in disadvantaging the defendant and thereby benefiting the prosecution in our adversarial system."); WEIDNER, *supra* note 236, at 32 n.5 (noting that individual prostitutes may be serving "as a means to an end" in that "[t]hey are being punished not so much for the harm that their crimes cause, but for the harm that their collective presence causes to places where they congregate"); cf. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 942 (2003) (claiming that "[t]he most important distinction" between problem-solving criminal courts and civil courts that engage in broad-based social reform is that "problem-solving courts act on individuals rather than attempting to redesign whole institutions at a time" and that, as a result, "[a] problem-solving court faces fewer competency obstacles

### B. Pernicious Police Practices and Judicial Processes

Having outlined my concerns with the motivations driving the development of specialized criminal courts that seek to address particularized problems, like prostitution, and the related danger that such institutions may be captured by special interest groups, I turn to the law enforcement practices and day-to-day procedures associated with such courts. Further drawing from Kross's critique of the Women's Court, I contend that many such practices raise additional questions about the desirability of these institutions.

Indeed, Kross criticized the law enforcement methods espoused by the Women's Court, including undercover vice squad operations that placed officers in the thick of sex trade activities and encouraged women to break the law.<sup>289</sup> She further suggested, as was borne out by the institution's various investigations, that not everyone seen and convicted in the court was guilty.<sup>290</sup> Yet, some of the very same policing tactics used during Kross's era, and more, are used today.<sup>291</sup> Vice squad investigations, including undercover operations, are very much a part of Midtown's prostitution crackdown.<sup>292</sup> And, as in Kross's time, these practices not only run the risk of having officers become enmeshed in the world of prostitution, but also may result in false arrests.<sup>293</sup>

Although these same dangers exist in ordinary courts that process cases stemming from vice operations, those courts do not actively encourage

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than a court overseeing structural reform").

289. See Kross, *History of the Women's Court*, *supra* note 25, at 4-7; see also *Mrs. Kross Scores Vice Case Methods*, *supra* note 111.

290. Kross, *History of the Women's Court*, *supra* note 25, at 4-7; see also Kross & Grossman, *History and Organization*, *supra* note 20.

291. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 749 (1999) ("The trajectory of doctrinal evolution has been away from a sense of the individual's right to be secure from government intrusions and toward an ever-enlarging notion of government authority to intrude.").

292. See SCOTT, *supra* note 237, at 54-55; THUKRAL & DITMORE, *supra* note 218, at 13-16.

293. See SCOTT, *supra* note 237, at 54-55; THUKRAL & DITMORE, *supra* note 218, at 13-16; see also Jennifer Block, *Street Sweeping*, VILLAGE VOICE, Nov. 19, 2003 (quoting a Legal Aid lawyer as stating, "If there are a bunch of prostitutes hanging around on a street corner," police "[p]ick them up and worry about the facts later"); Roane, *Prostitution Still Thrives*, *supra* note 237, at 25 (reporting on a brothel being "the focal point of a scandal involving 21 officers"); see also Ian Demsky, *Police Defend Prostitution Tactic*, TENNESSEAN, Feb. 2, 2005, available at <http://tennessean.com/local/archives/05/01/65061449.shtml> (last visited Feb. 11, 2006) (in an area contemplating a specialized prostitution court, police "spent almost \$120,000 over a three-year period to foster encounters, mostly skin-on-skin, between confidential informants and prostitutes in an effort to further Nashville's crackdown on the illicit sex trade").

such practices, thereby increasing the possibility of similar negative consequences. Indeed, traditional criminal courts, which provide the opportunity to raise unlawful search and seizure claims, at least to some degree, send a message that overzealous policing is inappropriate.<sup>294</sup> What is more, the Midtown model of permitting courts to be actively involved in police work violates the spirit, if not the letter, of the long-recognized rule of separation of law enforcement and judicial functions.<sup>295</sup>

It is true that the Midtown Community Court has developed its unique SOS program,<sup>296</sup> where social workers partner with officers to use a carrot-and-stick approach to forcefully encourage sex workers to avail themselves of services.<sup>297</sup> And use of social workers to provide assistance outside of a court setting comports with Kross's proposal to LaGuardia to jettison the Women's Court.<sup>298</sup> The involvement of police officers to push sex workers

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294. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (extending the exclusionary rule to state-court proceedings); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (exclusionary rule works "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing incentive to disregard it"). It is notable that during most of the Women's Court era, the exclusionary rule did not apply to state-level criminal proceedings. See *Weeks v. United States*, 232 U.S. 383, 398 (1914).

295. See *United States v. Leon*, 468 U.S. 897, 917 (1984) ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) ("[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement"); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963) (recognizing the importance in the Fourth Amendment context of "the deliberate, impartial judgment of a judicial officer" to "be interposed between the citizen and the police"); see also *In re Murchison*, 349 U.S. 133, 136-39 (1955) (violation of due process for judge in a criminal proceeding to be influenced by evidence collected and presented in grand jury); ABA MODEL CODE OF JUDICIAL CONDUCT, Canons 2 and 3 (2005).

296. See *supra* notes 228-232 and accompanying text (describing the Community Court's Street Outreach Services program).

297. ANDERSON, *supra* note 228, at 3-5; see also FEINBLATT ET AL., *supra* note 187, at 7.

298. As was discussed *supra* note 129, Kross expressed a disdain for "compulsory correction" and forced "rescue." These claims seem to be in tension, at least to some degree, with her suggested alternative of creating a "medical-social" tribunal for addressing prostitution. Indeed, her proposal suggests some level of norm-based essentialism. See KATHERINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, AND COMMENTARY* 871-872 (1993). Note however, Kross's apparent competing positions in this regard place her in the company of modern feminists who struggle with advancing novel theories and solutions without invoking the dominant position they purport to reject. *Id.* at 918-19; see also LENORE KUO, *PROSTITUTION POLICY: REVOLUTIONIZING PRACTICE THROUGH A GENDERED PERSPECTIVE* 138-51 (2002) (discussing the ongoing debate among feminists about prostitution); JOANNA PHOENIX, *MAKING SENSE OF PROSTITUTION* 35-69 (1999) (outlining the "differing, often contradictory manner in which academic explanatory narratives construct prostitutes," none of which "have managed completely to displace the 'either/or' analysis" when discussing women's engagement in prostitution); Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 770 (1990) ("When [Catherine] MacKinnon argues

into accepting services because the Court thinks they need them is, however, highly paternalistic and fails to respect individual sex workers' autonomy.<sup>299</sup> The reality is,<sup>300</sup> for good or for bad,<sup>301</sup> some individuals do not wish to leave the sex trade and are not interested in being "rescued."<sup>302</sup>

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that women who claim to enjoy consensual sex eroticize dominance . . . her arguments not only suggest a belief in the same kind of unsituated or objective knowledge she decries, but they also display a dismissive approach to women's accounts of their own experience that recalls the stance of the dominant ideology.").

299. Many sex workers and former sex workers, including Margo St. James, founding member of the prostitution rights group, COYOTE (Call Off Your Old Tired Ethics), believe sex work is an exercise of one's sexual autonomy. Press Release, COYOTE, Prostitutes Announce Victory at Beijing Women's Conference, *available at* <http://www.bayswan.org/Success.html> (last visited Feb. 11, 2006) (at a press conference, St. James stated, "Sexual autonomy includes whores; we are wives, we are lesbians and we are the breadwinners."); *see* CARMEN & MOODY, *supra* note 282, at 191 ("It is a fundamental denial of a woman's right to exercise her sexual autonomy, choosing or refusing certain virtues such as romantic love or monogamous marriage or vices such as mercantile promiscuity."); *see also* BARTLETT, *supra* note 298, at 715-20 (discussing competing feminist views on whether sex work ever reflects an autonomous choice); Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1291-1292 (1999) (noting that some prostitution reformers "believe that prostitution provides a livelihood for women and seek to improve the conditions of their work").

300. As a former public defender who has represented accused prostitutes and who is partial to the practical over the theoretical, I find the position of Margaret Jane Radin compelling:

[I]t appears that the solution to the double bind is not to solve but to dissolve it: remove the oppressive circumstances. But in the meantime, if we are practically limited to those two choices, which are we to choose? I think that the answer must be pragmatic. We must look carefully at the nonideal circumstances in each case and decide on which horn of the dilemma is better (or less bad), we must keep re-deciding as time goes on.

To generalize a bit, it seems that there are two ways to think about justice. One is to think about justice in an ideal world, the best world that we can now conceive. The other is to think about nonideal justice: given where we now find ourselves, what is the better decision? In making this decision, we think about what actions can bring us closer to ideal justice. For example, if we allow commodification, we may push further away any ideal of a less commodified future. But if we enforce noncommodification, we may push further away any ideal of a less dominated future.

Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1700 (1990).

301. Again, some might argue that the decision not to leave the sex trade is not the exercise of true, conscious choice, but simply some reflection of oppression at play, thereby "attributing false consciousness" to women who continue to sell sex for money. *See* BARTLETT, *supra* note 298, at 918-19.

302. VALERIE JENNESS, MAKING IT WORK: THE PROSTITUTES' RIGHTS MOVEMENT IN PERSPECTIVE (1993); Norma Jean Almodovar, *Who Will Rescue Us From Those Who Want to Rescue Us Against Our Will?*, <http://www.iswface.org/whowillrescueus.html> (last visited Feb. 11, 2006). As was noted by representatives of the National Association for Social Workers in a policy statement on sex work:

Similarly, the community court model has been criticized for placing much needed social services, like drug treatment and counseling, under the control of the criminal courts, rather than providing them in other settings.<sup>303</sup> Providing social programs through criminal courts, even if on a voluntary basis, suggests that recipients of such services should be monitored by the criminal justice system.<sup>304</sup> This works to further stigmatize and marginalize generally disenfranchised individuals.<sup>305</sup> Moreover, it may prevent people who would otherwise seek assistance from doing so.<sup>306</sup> Indeed, it has been thoughtfully suggested that many individuals, including sex workers, “would likely take advantage of these services on their own if they were packaged as comprehensively as they are in community courts.”<sup>307</sup>

Like the Women’s Court, the Midtown Community Court employs other questionable processes that may work to devalue the presumption of innocence and denigrate alleged and convicted sex workers. For instance, just as the Women’s Night Court invited spectators, prompting Kross and others to press for less voyeuristic proceedings,<sup>308</sup> the Midtown Community Court has actively solicited visitors to watch accused

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It is imperative that we hear and validate the voices of women who work, or have worked, as sex workers. The reality of all women can be validated by acknowledging that there is a continuum of experiences within the sex trade industry. This continuum is based on work venue (indoors/outdoors), legal status of worker, autonomy of worker, and other environmental factors. Many women are physically forced into sex work through kidnapping and trafficking. Many work in the sex industry because they do not have other viable options; for some women, poverty and starvation are the only alternatives to sex work. Other women choose to work as sex workers in the same way that some women choose to work as secretaries or as waiters or as field laborers. Some sex workers have other job skills and education, but freely choose to work as sex workers for a variety of reasons.

Lacey Sloan & Stephanie Wahab, Policy Statement on Sex Work, New Policy Statement, available at <http://www.iswface.org/mpsw0001.html> (last visited Feb. 11, 2006).

303. See Thompson, *supra* note 185, at 94 (“Although a [public] defender may recognize that her clients are often in need of a wide range of services, it is unclear whether the criminal justice system offers the best vehicle to intervene in their lives.”).

304. See Leslie Eaton & Leslie Kaufman, *Judges Turn Therapist in Problem-Solving Court*, N.Y. TIMES, Apr. 26, 2005, at B7 (noting that problem-solving courts may become “involved in the everyday lives of an increasing number of people”).

305. See THUKRAL & DITMORE, *supra* note 218, at 28 (“Problems faced by [sex workers interviewed] included homelessness, substance dependency, and extreme poverty and desperation at levels that are far worse than in the general population.”).

306. WEIDNER, *supra* note 236, at 149 (recounting that one interviewed prostitute “stated that the very fact that services were on-site (in a criminal justice building) would preclude him from taking advantage of a helpful program”).

307. See Thompson, *supra* note 185, at 94

308. See *supra* notes 51-53 and accompanying text.



prostitutes and others, as they are brought before the bench.<sup>309</sup> Although the right to public court proceedings is one that is fundamental to American criminal jurisprudence,<sup>310</sup> it is not intended to place a defendant on public display.<sup>311</sup> Such displays are particularly troubling when those who are encouraged to attend may operate under the mistaken assumption that anyone brought before the court represents a problem in their community—an assumption that seems to be fostered by the institution.

Indeed, the very nature of the Midtown Community Court—an arraignment part that handles only guilty pleas—not only suggests that anyone arrested must be guilty, but also helps immunize the institution's processes from legal scrutiny. That is, to contest charges, defendants must ask to have their matters transferred from the Midtown Court to the Downtown Court, which results in further detention and delay.<sup>312</sup> A relatively small number of defendants exercise this option.<sup>313</sup> In addition, because nearly every case is resolved by way of a guilty plea, few if any defendants seek to appeal their cases. Thus, unlike other criminal courts that may have their practices and processes reviewed by appellate tribunals, the Midtown Community Court has essentially, perhaps inadvertently, insulated itself from such review.<sup>314</sup>

The sentences imposed in the Midtown Community Court also tend to degrade sex workers. The court's requirement that offenders wear special attire so that they stand out while completing community service, despite claims to the contrary, serves no purpose other than to embarrass the offenders.<sup>315</sup> Whether proponents of the court claim that dressing sex

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309. See *Introducing: The Midtown Community Court*, *supra* note 201.

310. See *In re Oliver*, 333 U.S. 257, 273 (1948).

311. While some might argue that community residents are the "victims" of a prostitute's crime and, therefore, interested parties to a defendant's sentencing, it does not appear that the procedures relating to victim impact statements, such as notice to the defense, are utilized when residents attend the proceedings.

312. ANDERSON, *NEW LEGAL CULTURE*, *supra* note 180, at 6 ("Many defendants apparently are put off more by the prospect of longer hours in filthy lockups than by actually having to do community service.").

313. *Id.* (noting that only twenty-four percent of defendants refuse to plead guilty at arraignment and have their cases adjourned).

314. Cf. Quinn, *Whose Team*, *supra* note 186, at 51 n.89 (indicating that guilty plea-based problem-solving courts may evade appellate review because defendants may be forced to waive appellate rights in order to accept plea bargains in such courts).

315. One vocal critic of the Midtown Community Court, Robert Lederman, president of an advocacy group for street artists in New York City, offered this additional take on the community service sanctions imposed by the court:

Barbara Feldt, a community activist from the 54th Street Court was a guest speaker at the [Community Board] meeting and gave us some idea of just how this "alternative sentencing" works. "My personal interest is in maintaining trees,"

workers in this way helps “show the neighborhood that offenders are paying back the neighborhood for the damage they have done”<sup>316</sup> or puts a “face on a problem that people tend to objectify,”<sup>317</sup> it merely underscores the underlying desire to expose sex workers to the community at large.<sup>318</sup> Such practices are no different from other controversial prostitution shaming methods, like posting arrest photographs online or on billboards,<sup>319</sup> methods that have recently been promoted by vocal anti-vice groups and criticized by others as representing a throw-back to colonial times.<sup>320</sup> Moreover, shaming prostitutes, the class of individuals court reformers describe as being oppressed by pimps and social circumstances,<sup>321</sup> hardly seems consistent with their purported desire to uplift them.<sup>322</sup>

The Midtown Court’s preset penalty policies raise the additional issue of judicial abdication of sentencing discretion. Indeed, according to the Court’s newsletter to the Hell’s Kitchen community, “this Court does not sentence offenders to time served but offers varied community service and social service sentences to offenders.”<sup>323</sup> Thus, before ever seeing a defendant or considering the particular facts of her case, the court has decided that the jail time served prior to arraignment, a legal sentence, is an

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she explained. “So I call up the 54th Street Court Supervisor and have them send over defendants, who I supervise in maintaining the trees in my neighborhood.” When I commented that this sounded a bit like legalized slavery, she became offended and assured me that she had never profited in a personal way from any of the crews assigned to work under her direction.

*New Form of Oppression—The Community Court in The Injustice Line*, <http://home.earthlink.net/~ynot/commct.html> (last visited Feb. 11, 2006).

316. Wolf, *supra* note 180, at 352.

317. Hoffman, *supra* note 198, at 22.

318. See *Smith v. Doe*, 538 U.S. 84, 99 (2003) (upholding public notice requirements of Alaska’s Sex Offender Registration Act where “[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender”).

319. See, e.g., *Oakland Launches Public ‘Shaming Campaign,’* June 4, 2005, available at <http://www.wjla.com/news/stories/0605/233330.html> (last visited Feb. 11, 2006) (reporting that Oakland, California will begin “Operation Shame,” which will include posting photographs of convicted “Johns” on ten by twenty-two foot billboards); *This Week’s Prostitution Arrest Photos*, available at [http://www.stpaul.gov/depts/police/prostitution\\_photos\\_current.html](http://www.stpaul.gov/depts/police/prostitution_photos_current.html) (last visited Feb. 11, 2006) (weekly listing from the St. Paul police of men and women arrested for prostitution-related offenses, including names, descriptions, and photographs).

320. See James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 n.45 (1998); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890, 1912-15 (1991).

321. See Wolf, *supra* note 180, at 353.

322. See Massaro, *supra* note 320, at 1886 (shaming works to “trigger a negative, downward change in the offender’s self-concept”). Indeed, many communities that engage in shame tactics target customers, not prostitutes. See *supra* note 319.

323. *Introducing: The Midtown Community Court*, *supra* note 201, at 4.

insufficient punishment. And, it prospectively promises that all defendants—regardless of their individual circumstances—will receive sentences consisting of community service and, possibly, therapeutic programming. It employs these policies, in part, because they tend to “benefit[] the community.”<sup>324</sup> In engaging in such “mechanistic” practices to appease the public, however, the court implicitly declines to consider the full range of sentencing alternatives, thereby avoiding its obligation to exercise discretion and eschewing the concept of individualized sentencing.<sup>325</sup>

### C. Failing to Solve Problems

The various questionable features of the specialized courts addressed above might be less troubling if they really helped to solve societal problems. That is, if such specialty venues fostered substantive change, there might be reason to consider embracing them at the cost of more traditional conceptions of the criminal court system. This, however, has not been the case. Rather, such courts have tended to exacerbate the problems sex workers already face while failing to produce meaningful results for the rest of society.

For instance, the Women’s Court, which began with some intention of assisting prostitutes, came to be viewed by Kross as harsh and punitive.<sup>326</sup> Indeed, as Freda Solomon noted, “[i]n the final analysis, the legal structure designed to promote the salvation of women, to be courts *for* women, ultimately would prove instead to become courts *against* women.”<sup>327</sup> Similarly, it appears that the Midtown Community Court may negatively affect the lives of sex workers more than it improves them.<sup>328</sup> Many of those who continue to prostitute do so under worse conditions, more

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324. *Id.*

325. *See* United States v. Barker, 771 F.2d 1362, 1365-1367 (9th Cir. 1985) (“Whether the failure to individualize sentences is described as an abuse or an abdication of discretion . . . it is the failure itself which warrants defendants’ resentencing”; court’s “imposition of sentence was more ‘mechanistic’ than measured”) (internal citations omitted).

326. *See supra* notes 75-76 and accompanying text.

327. Solomon, *supra* note 23, at 5.

328. WEIDNER, *supra* note 236, at 107 (“The Midtown Community Court played a role, over and above the enforcement efforts of police, in making working on Manhattan’s streets more arduous for prostitutes.”); *see also* THUKRAL & DITMORE, *supra* note 218, at 10 (while law enforcement crackdown efforts “might temporarily address complaints of neighborhood residents, the immediate goal of getting sex workers off the streets must be balanced against the harm done by sweeps and the longer-term goal of assisting people who currently live on the margins of society to move towards self-sufficiency”).

dangerous circumstances, and for less money.<sup>329</sup> And their arrests, followed by sanctions and mandated services through the court, not only impede prostitutes' ability to support themselves, but are generally ineffective in assisting those who may wish to leave the sex trade.<sup>330</sup> As one social service provider has remarked, mandated programs through specialty courts like Midtown often amount to nothing more than "window dressing."<sup>331</sup>

Moreover, as Wolf concedes, the changes fostered by the Midtown Court do not substantially "'solve' the problem of prostitution."<sup>332</sup> Rather, not unlike the Women's Court, it has merely caused sex work to be "less visible and to a significant degree less disturbing to community members."<sup>333</sup> Or, as one longtime resident of Midtown said, "[i]t's been a sweep-it-under-the-rug kind of situation."<sup>334</sup> Thus, while one community's conditions may change as a result of such institutions like the Midtown Court, the practice of prostitution unquestionably continues.<sup>335</sup> And

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329. WEIDNER, *supra* note 236, at 107-11 (discussing the way in which prostitution became a "buyer's market" after the Midtown crackdown, forcing sex workers to accept lower prices and work longer hours to earn enough money to support themselves); THUKRAL & DITMORE, *supra* note 218, at 16 (suggesting that displacement may result in sex workers moving "to other, possibly more dangerous areas" and "undertaking other illegal activities" to replace lost prostitution income); *see also* WEIDNER, *supra* note 236, at 32 (describing opinions of researchers who believe that displacement of prostitutes may cause them to move to new areas where they suffer from isolation and are forced to work for pimps); *cf.* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1116 (2005) ("the cost of reducing disorder downtown may be increasing it elsewhere").

330. WEIDNER, *supra* note 236, at 157-58.

331. THUKRAL & DITMORE, *supra* note 218, at 74; *see also supra* note 209 and accompanying text.

332. Wolf, *supra* note 180, at 348.

333. *Id.*

334. Roane, *Prostitution Still Thrives*, *supra* note 244.

335. Notably, while Midtown Community Court proponents claimed that its approach to dealing with low-level, quality-of-life crimes comports with the "Broken Windows" theory of justice so as to prevent "an atmosphere where more serious crime [could] flourish," some question the legitimacy of the "Broken Windows" theory. *See* Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. L. & ECON. 235, 262-63 (2005) (noting that although Mayor Giuliani and Police Chief Bratton achieved significant results in reducing some crimes after implementing "a strategy in NYC in which the police department aggressively pursued misdemeanor public-order offenses such as vandalism, public intoxication, and prostitution," the effects of the broken windows theory were not "universally significant"); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence of Deterrence, The Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); *see also* Dan Hurley, *Felton Earls: On Crime as Science (A Neighbor at a Time)*, N.Y. TIMES, Jan. 6, 2004, at F1 (in a study published in *The American Journal of Sociology*, "Dr. Earls reported that most major crimes were not linked to 'broken windows' but to two other neighborhood variables: concentrated poverty and . . . collective efficacy.").

although this may be sufficient to appease some members of the Midtown Community, pushing street walkers to work other neighborhoods is probably not something those “other” communities, or the world at large, views as “problem-solving.” This is particularly true given that not every neighborhood can afford to establish and run a community court.<sup>336</sup> Thus, the Midtown’s problem-solving rhetoric is somewhat misleading. In many ways, the institution is merely problem-shifting.

#### D. Diverting Attention from the Real Issue

Indeed, the failings outlined above demonstrate that establishing specialized criminal courts to deal with prostitution simply avoids the real problem<sup>337</sup>—that is, whether we should continue to criminally prosecute such conduct. Prostitution, obviously, is a complicated issue.<sup>338</sup> But, like Kross,<sup>339</sup> I believe it must be discussed and examined outside of the confines of the criminal justice system. Conversations about the trade need to be better informed by the community of individuals doing the work,<sup>340</sup> not dominated by those who wish to exclude sex workers from their communities. Indeed, persisting in locating the issue of prostitution within

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336. See ANDERSON, A NEW LEGAL CULTURE, *supra* note 180, at 10 (quoting Chief Justice Judith Kaye of the New York Court of Appeals as stating: “We can’t afford to put these courts all over the city . . . but we can put them in some places, and we can restore the feeling of confidence people have that the courts can work for them.”).

337. Cf. Sandler & Schoenbrod, *supra* note 287, at 939 (“A point that we add to those made by Chayes is that, by making the hard choices that Congress ducks, the courts enable Congress to continue to pass the sweeping, aspirational statutes that put power in the hands of the controlling groups.”).

338. See *supra* notes 298-299; see also CARMEN & MOODY, *supra* note 282 (prostitution “clearly is one of the most persistent and universal social issues in the history of both ancient and modern cultures”); DOROTHY MCBRIDE STETSON, WOMEN’S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES 292-301 (2d ed. 1997) (describing various views on prostitution, including disagreements among feminists as to whether such conduct should be decriminalized).

339. See *Social War*, *supra* note 25.

340. See *Policy Statement on Sex Work*, *supra* note 302; see also PHOENIX, *supra* note 298, at 189 (1999) (“[I]f any social or political intervention into the lives of prostitute women is to be successful, it must be capable of containing and reflecting the contradictory experiences of prostitutes and the paradoxical ways in which they make sense of their involvement of prostitution.”). The Urban Justice Center indicated that one of the Midtown Community Court’s strengths is that it acknowledges “many street-based sex workers are residents of the community . . . and thus part of the community rather than outsiders.” See THUKRAL & DITMORE, *supra* note 218, at 16. For instance, the court added medical services to its list of program offerings based on conversations with sex workers. See *id.* However, the court’s literature does not indicate that sex workers were consulted at the court’s planning stage, that they assisted in the development of the court processes, or that the formulation of the court’s operational goals took their desires into account. Thus, it appears prostitutes have not been treated like other stakeholders in the Community Court.

the realm of deviance and crime fails to adequately take into account the complex underlying issues related to the sale of sex.<sup>341</sup> Reflexively continuing to criminalize prostitution<sup>342</sup> does nothing to achieve understanding of its causes and effects,<sup>343</sup> to empower those engaged in such work,<sup>344</sup> or to ensure that those who may be victimized by the trade are protected.<sup>345</sup>

Moreover, particularly given court reformers' implicit concession that modern community stakeholders are not so much interested in suppressing sex work, as they are interested in regulating the behaviors of those engaged in the trade,<sup>346</sup> our current arrest and criminal prosecution

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341. KUO, *supra* note 298, at 153 (opining that "much of what needs to be done for prostitutes is what needs to be done for all women, including the provision of social services and legal sanctions directed at improving our economic opportunities and providing support for those who are survivors of both sexual and non-sexual abuse"); Balos & Fellows, *supra* note 299, at 1284 ("Prostitution functions as a paradigm of degeneracy and as a practice of inequality in the late twentieth century because the degeneracy/respectability dichotomy that thrived in nineteenth-century society has continuing vitality"); Meyer, *supra* note 283, at 108 (criminalizing prostitution "far more than prostitution itself, institutionalizes male sexual domination and social control of women").

342. If prostitutes engage in conduct in the course of their work that would be otherwise prosecuted, for instance, endangering motorists by walking into traffic, such behavior can be prosecuted. Indeed, this seems to be the kind of behavior that is most troubling to residents in the Midtown area. This is not to say that prostitutes should be above the law. Those sex workers who engage in other criminal activities should be prosecuted for such acts in ordinary criminal courts that do not focus on the "problem" of their occupation.

343. See, e.g., PHOENIX, *supra* note 298, at 75 (referring to prostitution as a "gendered survival strategy"); GRAHAM SCAMBLER & ANNETTE SCAMBLER, *RETHINKING PROSTITUTION, PURCHASING SEX IN THE 1990'S* 7 (1997) (noting that some women engage in prostitution because of economic need or emotional vulnerability); THUKRAL & DITMORE, *supra* note 218, at 9 ("All respondents were involved with commercial sex work for financial reasons" and "[t]he . . . majority (22 of 30) of street-based sex workers named substance dependency as the reason they continued to work on the streets. . ."); see also GLOBAL SEX WORKERS: RIGHTS RESISTANCE AND REDEFINITION 29 (Kamala Kempadoo & Jo Doezema eds., 1998).

344. Meyer, *supra* note 283, at 107 (advocating decriminalization of prostitution with regulations "aimed directly at empowering prostitutes to gain adequate wages, protection from disease and abuse, and employment benefits").

345. See CARMEN & MOODY, *supra* note 282, at 43, 55 ("The illegality of prostitution encourages some men to view the women as easy targets, worthless and degraded human beings about whom society is unconcerned" and "forces women to lead unstable and continuously disrupted lives"); THUKRAL & DITMORE, *supra* note 218, at 47 ("Crimes against prostitutes usually go unpunished. There is a tacit acceptance of this form of violence, usually committed against women."); see also Dorothy McBride Stetson, *The Invisible Issue: Prostitution and Trafficking of Women and Girls in the United States*, in *THE POLITICS OF PROSTITUTION* 145 (Joyce Outshoorn ed., 2004).

346. Wolf, *supra* note 180, at 347-48, 355-58; see also KUO, *supra* note 298, at 153 (claiming that "[a] majority of Americans already favor legalization of prostitution"); Weitzer, *supra* note 177, at 90 ("Some cities already have an informal policy of de facto decriminalization of indoor prostitution—essentially ignoring call girls, escort agencies, and massage parlors unless a complaint is made, which is seldom."); see also *San Francisco*

practices seem well off the mark. Thus, prosecution of sex workers in expensive, experimental, criminal courts, when funding for such institutions could be used to problem-solve in more meaningful ways, is just wasteful.<sup>347</sup>

## V. CONCLUSION

Our justice system has reached a crisis state with more and more individuals cycling through our courts, jails, and prisons. It is high time for reform. In our desire to improve the workings of our justice system, however, we must be careful not to add to its problems. Moreover, in this time of precious few resources, we should avoid throwing money at solutions that have not proven successful.

With this in mind, rather than press for the creation of additional specialized criminal courts that focus on prostitution and other community “problems,” I would suggest that reformers pull back from their somewhat overzealous call to action. We should take more time to carefully assess the extent to which today’s reforms may be repeating history’s mistakes and, as a result, eroding our societal fabric more than the act of prostitution itself. Moreover, we should more thoughtfully consider the real problems plaguing today’s criminal justice system—including its extreme overuse as a response to societal issues, at a time when so many members of our national community are underserved by other government institutions.

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*Task Force on Prostitution: Final Report 1996*, available at <http://www.bayswan.org/3sumrec.html> (last visited Feb. 11, 2006) (“The Task Force . . . recommends that the City departments stop enforcing and prosecuting prostitution crimes.”); see also Meyer, *supra* note 283, at 103 (advancing regulation over criminalization).

347. Using the Midtown Community Court’s own estimated cost figures, to date it has expended fifteen million dollars above and beyond what it would cost to operate an ordinary arraignment part. See *supra* note 185.