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THINK PIECE

# Judges and Problem-Solving Courts

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*Written by*

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# Judges and Problem-Solving Courts

Lawyers, of course, are completely comfortable with the notion that the substantive law must change and adapt to meet changing social conditions. But they are distinctly less comfortable with the idea that the structures of the justice system may also need to evolve to meet current demands. I suppose this shouldn't be too surprising: my work uniform hasn't changed for centuries, and I do my job in a building smack out of ancient Athens. You don't need a degree in semiotics to conclude that ours is a profession that values formal stability and continuity.<sup>1</sup>

– New York State Chief Judge Judith S. Kaye

## Introduction

In recent years, a growing number of judges around the country have begun to test new ways of doing justice, re-engineering the ways that state courts address such everyday problems as mental illness, quality-of-life crime, drugs and child neglect. These innovators are united by a common belief: that judges have an obligation to attempt to solve the problems that bring people to court, whether it be as victims, defendants, litigants or witnesses. The name most often used to describe this new kind of thinking is problem-solving justice.

What does a “problem-solving” court look like? What's different about this approach? How does it affect the roles of judges? And given that the legal profession values “formal stability and continuity,” where are the principal points of tension between problem-solving and traditional case processing? These are just a few of the questions taken up in this essay.

Despite the growing prominence of drug courts, community courts, domestic violence courts and other problem-solving judicial experiments, very little scholarship to date has been devoted to exploring how these new experiments impact judges. With that in mind, this essay seeks to map the territory of problem-solving judging, investigating how problem-solving courts have affected the role of the judge – both inside and outside the courtroom. In so doing, our goal is not to offer the final word on the topic or to evaluate whether problem-solving courts are a “good thing” or a “bad thing.” Rather, we seek to stimulate conversation – and to inform the continuing development of problem-solving courts.

Given that we are swimming in relatively uncharted waters, there are a number of challenges in writing an essay like this. One is finding the right level of abstraction. A document that is too theoretical will be of little use to the real-life judges

grappling with the challenges of problem-solving on the ground. Similarly, an article that is merely descriptive rather than analytical will fail to uncover the key legal and ethical concerns raised by problem-solving courts.

Another potential trap for an essay like this one is to slip into an easy dichotomy – “advocates say X, detractors say Y” – that is unfair both to proponents and opponents of problem-solving justice. Indeed, we have found that many of the most thoughtful critics of problem-solving are the judges who have presided over these courts. It is also true that those with real reservations about problem-solving justice are capable of appreciating the flaws in the current system.

A final challenge is the problem of myth and misconception. There are a number of common misunderstandings about problem-solving courts – for example, that these programs are really diversion programs and not courts, that defense attorneys have no role in the process, that judges are asked to provide direct services to offenders, etc. No informed analysis of problem-solving courts is possible without a thorough understanding of where and how these new programs depart from business as usual in the courts.

Problem-solving judging is by no means the standard way of doing business in state courts, but it is gradually attempting to move from the margins of the American legal system into the mainstream. If this effort is to bear fruit, problem-solving courts must begin to address some of the concerns identified in this paper – concerns about judicial independence, neutrality, paternalism and ex parte communication. They must demonstrate that problem-solving is not antithetical to the American legal tradition but rather an embodiment of some of its highest principles. And they must navigate some tricky political shoals. Problem-solving courts have raised hackles among both liberal and conservative commentators. On the right, problem-solving conjures images of a fuzzy-minded judiciary hell-bent on rehabilitation at the expense of accountability and individual responsibility. On the left, it raises the specter of a misguided judiciary unfettered by the restraints of the adversarial system, eager to send poor and defenseless defendants into lengthy social interventions for their own good, proportionality be damned.

The only way to address all of these concerns and challenges is by stimulating public debate, by investing in research to document both the process and the impacts of problem-solving courts and by identifying and disseminating best practices to the field, providing judges and attorneys with guidance about the best way to carry out their new roles and responsibilities. It is our hope that this paper will make a small contribution to this effort, helping to ensure that problem-solving courts develop in a way that is thoughtful, responsible and takes into account the concerns of critics on all sides.

In an effort to resolve these dilemmas, we have relied heavily on the first-hand accounts of practicing state court judges – both those who have presided over problem-solving courts and those who have not. Our hope is that this will ensure the article’s accuracy and relevance while allowing us to represent at least a fraction of the diversity of opinion engendered by problem-solving courts. Through

the voices of real judges, this essay attempts to articulate the strengths and the weaknesses – and the challenges and the opportunities – presented by problem-solving courts.

We begin by setting the stage, asking “what is a problem-solving court?” We then examine a single judge's decision to participate in a problem-solving court before discussing more broadly the concerns other judges have had about this new model. Next, we examine the role of the judge within the courtroom, asking several basic questions: How does a problem-solving court affect a judge's interaction with defendants? With attorneys? What are the implications for the adversarial process? We also look at the role of problem-solving judges outside of the courtroom: What is the nature of a problem-solving judge's interaction with citizens and community groups? With executive branch agencies? What are the implications for judicial neutrality and independence? We conclude by coming full circle, returning to the question of what motivates judges to participate in problem-solving courts and asking judges what the challenges and rewards of this new form of judging are.

### **What Is a Problem-Solving Court?**

The best place to start a conversation about problem-solving courts is by offering a succinct description of their operation and how they differ from conventional case processing. Take a typical drug treatment court, for example. The differences start well before cases even reach the courtroom. The best drug courts are the product of rigorous, inter-agency planning. This means bringing the defense bar and the local prosecutor to the table to determine which defendants are eligible to participate in the program and to hammer out a pre-arranged system of graduated sanctions and rewards with which to respond to participants' progress in treatment. It also means working with drug treatment providers, probation departments and police in advance to establish protocols for reporting back to the court. In this way, many of the thorniest operational issues are settled long before a drug court even opens its doors for business.

There's no cookie-cutter model for creating a drug court – the model is flexible enough to adapt to local conditions and local legal cultures. Each jurisdiction defines its own caseload, chooses its own treatment providers and creates its own responses to failure (and success) in treatment. But there are some basic elements that all drug courts share. One is that all parties – judge, prosecutor and defender – must agree that a defendant meets the eligibility criteria for participation in drug court (typically, that a defendant is charged with a non-violent felony and has a history of addiction). Another is that all participants must agree to a formal treatment plan that stipulates the length of treatment, the treatment modality and the consequences they face if they fail to comply with court orders. In some drug courts, defendants plead guilty, with the understanding that if they comply with court-mandated treatment, the court will vacate the plea and dismiss the charges or otherwise reduce the sentence. In other drug courts, prosecution is deferred pending the outcome of treatment. These are the kinds of details typically worked out in advance by all parties.

No matter what kind of plea structure a drug court has in place, once participants are linked to treatment, they are rigorously monitored, reporting to the court at regular intervals and submitting to frequent drug testing. Despite their name, drug courts care about a lot more than just drug use; many participants find themselves linked to an array of services (job training, health care, education, housing) designed to insure their successful transition from addiction to sobriety – and from crime to law-abiding behavior. In many places, special computer technology makes it possible to keep track of how each participant is doing, so the judge is well informed at each appearance and can respond immediately as problems arise.

As a drug court participant progresses in treatment, she's likely to encounter some unusual events. For example, she might see an unusual presence in the courtroom – a resource coordinator charged with serving as an institutional link between the court and off-site treatment providers. She might find that if she tests positive for drugs, the prosecutor's first response is not to argue that she should be incarcerated but to understand that relapse is part of the recovery process. She might also discover her defense attorney agreeing with the prosecutor that a move from out-patient to in-patient treatment is appropriate. And she just might come to see the judge in a new light as well – as someone who not only metes out punishment but also rewards success in treatment with applause or a graduation ceremony in the courtroom.

Drug courts are hardly the only kind of problem-solving court that has emerged in recent years – others include “community courts” that seek to improve the quality of life in neighborhoods struggling with crime and disorder; “domestic violence courts” that shine a spotlight on a group of cases – violence between intimates – that have historically gotten short shrift from the justice system; and “mental health courts” that link mentally-ill defendants to long-term treatment instead of incarceration. All told, there's about a thousand of these experimental courts currently in operation, with dozens more in the planning stages.

What do all of these initiatives have in common? What each shares is an underlying premise: that courts should do more than just process cases. That at the end of the day, the goal is not just to make it through the calendar, but to make a difference in the lives of victims, the lives of defendants and the lives of neighborhoods. In one way or another, all of the new judicial experiments are attempting to solve the kinds of cases where social, human and legal problems intersect. The basic elements of the problem-solving approach include:

**The Bottom Line** Problem-solving courts seek to achieve tangible outcomes for victims, for offenders and for society. Depending upon the court, these might include reductions in recidivism, reduced stays in foster care for children, increased sobriety for addicts and safer and cleaner neighborhoods. In practice, what this really means is that judges and prosecutors and defenders are defining success in new ways – and in ways that are not in opposition to each other. So the judge is not just worried about process and precedents. The prosecutor is not just concerned with locking up “bad guys.” And the defender isn't just looking to get her client off. Instead, they are

all saying that the goal of going to court is to help address defendants' problems, help victims and improve public safety.

**Using the Power of Judges** Problem-solving courts make aggressive use of a largely untapped resource: the power of judges to promote compliance with court orders. Instead of passing off cases after rendering a sentence – to other judges, to probation departments, to community-based treatment programs or, in all too many cases, to no one at all – judges at problem-solving courts stay involved with each case over the long haul.

**Courts Can't Do It Alone** Problem-solving courts acknowledge that many of the cases that appear in court have a social and human dimension as well as a legal one. For this reason, they employ a collaborative, multi-disciplinary approach, relying on both government and non-profit partners (social scientists, treatment providers, probation departments, community groups and others) to help improve decision-making.

**Change Outside the Courtroom** Problem-solving courts tend not to confine their reformist energies to the four walls of the courthouse. In addition to re-examining individual case outcomes, problem-solving courts also seek to achieve broader goals in the community at large, using their prestige to affect change outside the courtroom without comprising the integrity of the judicial process within the courtroom.

**New Goals Mean New Roles** Problem-solving courts don't just introduce new players into the courthouse – they also ask existing players to take on new roles. For example, many problem-solving courts have asked judges to play the role of convener and broker, using their authority to coordinate the work of other agencies.

As judges have shifted from standard case processing to problem-solving, a number of issues have emerged: What is the impact of problem-solving on such traditional legal values as judicial independence, neutrality and impartiality? Do problem-solving courts broaden the scope of judicial discretion? Are they invitations to judicial paternalism? And what is their impact on due process protections and procedural fairness? These are just a few of the questions that judges who sit – or who are asked to sit – in problem-solving courts must grapple with.

## **One Judge's Decision**

There's no disguising the fact that the first generation of judges to preside over problem-solving courts was taking a real risk. Brooklyn Judge John Leventhal's story is instructive. Leventhal's experience with problem-solving courts began back in the spring of 1996 with a conversation with Brooklyn Chief Administrative Judge Michael Pesce.

Pesce presented Leventhal with a fascinating opportunity. Pesce was looking for a judge who was willing to explore new ways of handling cases; someone who was as

good at forging partnerships as he was at parsing the law, and who didn't shy away from gut-wrenching cases. Pesce was offering Leventhal a chance to preside over a judicial experiment, the first of its kind in the state: a specialized domestic violence court. The court would handle crimes that stood out not only for their violence, but for the fact that the accused and their victims were intimately involved. The idea behind the specialized court was to improve the judicial response to domestic violence. The thinking was simple: that the unique nature of domestic violence cases demanded a unique set of skills and knowledge from judges, attorneys and social workers. By aggregating these cases in a single courtroom, it would be possible to do a better job of prosecuting cases and protecting victims.

Leventhal was intrigued. The idea of a domestic violence court reminded him of why he got into the law in the first place. “A lot of judges and lawyers want to help people and the society at large,” he later reflected, “but it’s rare to get a case that actually means something to humanity. At the Domestic Violence Court, I feel like I’m doing meaningful work every day.”<sup>2</sup>

Accepting Pesce’s offer was hardly out of character for Leventhal. After all, his career was full of unexpected twists and turns. In the early 1970s, the Bronx native competed in Golden Gloves tournaments. When boxing didn't lead to fame and fortune, he started teaching math in a South Bronx middle school; and then, still searching for the right career, he decided that law was his calling. Still, after 15 years in private practice, Leventhal itched for something new. So he ran for judge – and won.

Leventhal hoped that Pesce had chosen him because he felt he was the best person for the job. But secretly he thought that Pesce was turning to him, a relative newcomer to the bench, because other more established jurists had turned him down. Handling domestic violence cases did not exactly seem like a choice assignment. For one thing, Leventhal wasn't entirely sure he was up to the task. After all, what did he know about domestic violence? In private practice, he'd had only one domestic violence case; and he'd handled just a single domestic violence case so far as a judge.

While Leventhal felt he had much to learn, he knew enough to know that domestic violence cases posed special challenges. Such cases were hardly ever straightforward, but rather colored by the complex relationship between victim and accused. Unlike stranger-on-stranger crimes, in which victims almost always cooperate with authorities, Leventhal knew that victims of domestic violence were often reluctant witnesses. They tried to drop charges, refused to talk to prosecutors, even sometimes testified on the defendant's behalf. Victims knew their attackers intimately, often lived with them for many years and frequently had children in common. Many professed to be in love with their assailants. Even those who didn't were often bound to defendants financially and emotionally, making the cases fraught with unique challenges that went far beyond determining a defendant's culpability.



**Changing Practice**

But the biggest challenge wasn't uncooperative victims; nor was it Leventhal's lack of knowledge about domestic violence. Leventhal knew that the hardest part of the job would be keeping victims safe. Defendants charged with domestic violence crimes routinely violated orders of protection – sometimes with tragic results.

In fact, when Leventhal was offered the job, the criminal justice system in New York City was still reeling from the murder of a local woman who had been killed by her boyfriend, despite two orders of protection. In some quarters, blame for the widely-reported murder fell on the shoulders of the judge who three weeks earlier had reduced bail for the offender after he'd been jailed on a misdemeanor stalking charge. The presiding judge was vilified in the city's tabloids for months and both the mayor and the governor called for his ouster.

Of course, the problems with the criminal justice system's response to domestic violence went beyond the failings of any individual judge. Nor was it exclusive to New York. Around the country there was a growing concern – among feminists, victim advocates, scholars and others – that the courts were not adequately equipped to protect victims or monitor compliance with orders of protection.

Historically, many police officers, judges and prosecutors viewed domestic violence cases as a “private” or “family” matter.<sup>3</sup> Police, for example, often responded to reports of domestic violence by escorting the assailant around the block to “cool off,” and then returning him home, where the abuse continued. If a case made its way to court, prosecutors frequently dropped the charges at the victim's request, and judges only sporadically issued orders of protection. Even when they did, the orders often proved ineffective – a 1996 study found that 60 percent were violated within one year. And another study found that more than one in six victims killed in domestic incidents had obtained orders of protection.<sup>4</sup>

In response to advocacy from the feminist movement and victim-rights groups, criminal justice leaders in the 1980s and 1990s began to respond with a variety of initiatives, including specialized domestic violence units in police departments and prosecutors' offices, tougher criminal sanctions for abusers and reforms that made protection orders easier to obtain. “There was a big push to increase arrests. States passed mandatory arrest legislation and funded training for police,” says law professor and domestic violence expert Emily Sack.<sup>5</sup> Supporting these initiatives was a special office within the Department of Justice, which was created in 1994 to provide funding and guidance to criminal justice agencies around the country as they tried to respond more effectively to domestic violence.

From 1989 to 1998, domestic violence filings in state courts increased 178 percent – a jump that was likely the result of increased public awareness of domestic violence and more rigorous enforcement.<sup>6</sup> As more and more cases arrived in the nation's courts, the judiciary began to adapt as well. Court systems, starting in the 1980s and picking up steam throughout the 1990s, began experimenting with ways to improve their handling of domestic violence cases: some established separate calendars to hear only domestic violence cases; some began offering increased services to victims, such as links to shelters or financial assistance; some focused on safety in

the courthouse, providing separate and secure waiting areas for victims and their children.

In some places, these efforts eventually evolved into full-fledged “domestic violence courts.” The first domestic violence court was launched in Quincy, Massachusetts, in 1987. Now, fifteen years later, there are about 300 specialized domestic violence court initiatives around the country.<sup>7</sup>

### **‘Something Awful Might Happen’**

At the time Judge Pesce approached Leventhal in 1996, the concept of a domestic violence court was still fairly new. There were only a handful of such courts around the country, but most shared two key goals: to improve victim safety and to increase the accountability of offenders.<sup>8</sup>

In fact, “victim safety and defendant accountability” is a mantra repeated again by those who work in domestic violence courts. Since there is no scientific evidence that shows that perpetrators of domestic violence can be rehabilitated (and a fair amount of anecdotal evidence to suggest the opposite), most domestic violence courts scrupulously avoid rehabilitation as a goal. In a sense, this sets domestic violence courts apart from other problem-solving courts. While drug courts, mental health courts, and community courts aspire to help offenders change their behavior, domestic violence courts are almost single-mindedly focused on simply ensuring that defendants abide by protection orders. If they have any interest in rehabilitation at all, it's focused on the victim – specifically providing her with the services she needs to be protected from future harm.

The Brooklyn court was no exception. Victim safety took precedence. By handling all felony cases from the borough in a single courtroom under a single judge, the court was designed to develop a focused expertise in domestic violence. Just as important, by assigning all cases to a single judge, the court would seek to promote greater consistency. In the new court, for instance, an order of protection would be issued in every case – whereas in the past, “some judges would issue orders of protection and some wouldn't,” says one Brooklyn prosecutor. “Every judge had their own rules.”<sup>9</sup>

The court would also not simply issue an order of protection and then forget about it for six months; the court would carefully monitor compliance with the order and swiftly sanction – with jail, if necessary – any violations. In addition, the court wouldn't adjourn cases for months at a time, but require defendants to return on a regular basis, if only to impress upon them that the court was closely watching them. Defendants would also be required to participate in batterer-intervention programs as a condition of bail. And there would be extra staff to work with victims and provide them services, such as safe houses, financial aid and job training.

In the end, Leventhal signed on to the experiment. He did so even though he knew that despite rigorous court involvement, a tragedy might be unavoidable. “There's an emotional dynamic, and things can be unpredictable,” Leventhal said. “I knew that I would always be worrying that something awful may happen.”<sup>10</sup> Six years after taking on the assignment, Leventhal's fear of tragedy hasn't waned: “What

haunts me is the specter, the prospect that, God forbid, there's a fatality or a terrible beating...I would think I am to blame.”

**‘High-Risk, Low-Benefit and Undesirable’**

Leventhal's hesitation about presiding over a problem-solving court was in many ways typical of his peers. “To many judges, assignment to a specialized domestic violence docket is viewed as high-risk, low-benefit, and, consequently, undesirable,” writes Susan Keilitz of the National Center for State Courts.<sup>11</sup> But it's not just domestic violence courts that concern judges. Why are judges reluctant to preside over problem-solving courts? The reasons go much deeper than the apprehension of individual judges and reflect deep-seated institutional concerns about problem-solving courts and their implications.

It's very easy, at least on the surface, to see why judges might not want to preside over a problem-solving court. Judges are trained to respect precedent and tradition, and, to many eyes, problem-solving courts represent the opposite: something new and unknown. “Our branch of government tends to be the most tradition-bound branch of all,” says Thomas Zlaket, chief justice of the Arizona Supreme Court. “We are the slowest to change, we're the most reluctant to change. It might have something to do with the fact that we are trained to rely on precedent. Our whole lives are precedent. The word precedent binds us.”<sup>12</sup>

Tradition dictates that judges serve as neutral arbiters and that their work focuses on process and penalties. But in a problem-solving court, judges are asked to focus on other issues, such as the underlying problems that bring defendants to court, the impact of criminal behavior on victims and the implications of crime for a community. In short, in a problem-solving court, context matters in a way that it doesn't in most conventional courts.

Many judges are understandably concerned with expanding their scope of work in this way. Some wonder whether the problems that problem-solving courts address – such as drug addiction, mental illness and domestic violence – are even solvable. Problem-solving judges are the first to admit that the challenges are sometimes insurmountable. Judge Raymond Norko, founding judge of the Hartford Community Court, describes the challenges of addressing the problems of women engaged in prostitution: “They come in with so much baggage – drugs, mental health problems, physical health complaints, along with economic structures – that make it very, very difficult to keep them out of the cycle [of crime],” Norko says.<sup>13</sup> Similarly, the first drug court judge in the country, Stanley Goldstein of Dade County, Florida, worried that “there was no way we were going to get people off crack cocaine. I saw people who had come out of the sewers so addicted to cocaine they would sell their first-born.”<sup>14</sup>

Beyond concerns about whether certain kinds of problems can even be solved, many judges also wonder about the appropriateness of problem-solving. Says Judge Truman Morrison III, of the District of Columbia Superior Court: “When you try and channel the energies of social change into the judicial branch, it's not a good fit. Judges' own personal world views shouldn't be unleashed under the guise of special

courts.”<sup>15</sup> Morrison’s concerns are echoed by Denver District Judge Morris B. Hoffman: “We are judges, not social workers or psychiatrists. We administer the criminal law because the criminal law is its own social end. It is not, or at least ought not to be, a means to other social ends.”<sup>16</sup>

According to Richard Cappalli, a professor at Temple Law School,

When judges move out of the box of the law and into working with individual defendants, transforming them from law-breaking citizens into law-abiding citizens, we have to worry. Because what has always protected the bench has been the law. Whenever a judge is approached by a disgruntled individual saying, “How could you do that?” The judge always says: “That wasn’t me speaking – that was the law.” If we take the mantle of the law’s protections off of the judges and put them into these new roles, we have to worry about judicial neutrality, independence, and impartiality.<sup>17</sup>

Even judges engaged in problem-solving justice worry that by expanding their mandate, there's a chance they'll create new problems rather than solve existing ones. “I'm not sitting back and watching the parties and ruling,” says Judge Cindy Lederman of Florida. “I'm making comments. I'm encouraging. I'm making judgment calls. I'm getting very involved with families. I'm making clinical decisions to some extent, with the advice of experts. So I have much greater opportunities, I think, to harm someone than I would if I just sat there, listened, and said guilty or not guilty.”<sup>18</sup> Judge Patricia Young, who presides over a community court in Boise, Idaho, also acknowledges that her work is “a lot messier” than conventional judging: “You're dealing with human issues and concerns in a more personalized way, trying to find out what's going on with these people so that the consequences we come up with are appropriate.”<sup>19</sup>

### **Soft on Crime?**

Concerns about the complexity of cases and the chances of actually solving the problems of offenders only scratch the surface. In working to meet the new goals of problem-solving courts, judges are raising important questions about the nature of judicial independence, the risks of paternalism, the efficacy of the adversarial system, and the tensions that exist between criminal justice imperatives (where public safety concerns are paramount) and the dictates of social work (where the needs of the individual client are of primary concern).

The concern most often expressed about judges in problem-solving courts is that they've forsaken the rigors of law for the fuzzy world of psychology. Many judges in problem-solving courts have found themselves derided as “touch-feely,” “soft on crime,” and “coddling.” “The truth is that problem-solving courts always have to fight the knee-jerk reaction people have to throw everyone in jail,” says Judge Norko of the

Hartford Community Court. “Anything short of jail to a lot of people is not effective.”<sup>20</sup>

The perception of “softness” is fueled, in part, by the fact that problem-solving courts are often structured around alternatives to incarceration (although not always, since domestic violence courts tend to encourage more traditional outcomes, such as probation or jail). But many problem-solving judges actually argue that their courtrooms are tougher than conventional courts.

“The reality of it,” says Judge Melanie May, a former drug court judge, “is that anybody that goes through drug court does almost 100 times more as far as treatment hours and attendance at court and toeing the line than most traditional probationers do who only have to go once a month to a probation officer.”<sup>21</sup>

Judge Joseph Valentino, presiding judge of a drug court in Rochester, New York, puts it this way:

I was really skeptical about drug courts at first, thinking that they were one of those liberal touchy-feely programs where you just pat somebody on the back, get them on probation and get them out of the courtroom. But after watching the drug treatment court in Rochester a couple of times, I realized that it was not a social worker type of court. It was the first time that I saw defendants having to take responsibility for their actions. Defendants were immediately accountable. The judge knew whether they were following their program within a couple of days, not months later.<sup>22</sup>

Judge Stephen V. Manley, who founded a drug court in Santa Clara, California, also rejects the notion that problem-solving courts are easy. He recounts a laundry list of complaints he has heard about problem-solving courts: “the judges are social workers; the judges don't hold people accountable; that they're soft, fuzzy; that they have no standards. I think that's a great misconception. Problem-solving courts in my view are the most accountable courts we have because the judge is responsible for each and every individual. There's no passing the buck. They [defendants] are seen more often, followed more closely than any other defendants. They tend to be, in my mind, the most accountable courts we have.”<sup>23</sup>

### **Testing the Limits of Judicial Authority**

Indeed, most problem-solving judges end up playing a much more vigorous role in the lives of offenders. Judging in a problem-solving court doesn't end when a disposition has been reached. Rather, problem-solving judges require offenders to return to court frequently to report on their progress in meeting the court's mandates. And over the course of many court appearances, judges in problem-solving courts often find themselves learning about offenders' home lives, children and other personal issues that are normally well outside the concerns of a conventional judge.

According to Judge Jamey Weitzman, who presided over a drug court in Baltimore, the judge inquires “into many facets of offenders' lives, including employment, health and family life. In fact...the judge is familiar with each defendant in an almost parental role.”<sup>24</sup> For drug court advocates, these inquiries are justified by the idea that the court is trying not just to get the offender sober, but to remove any other obstacles to a law-abiding life. Therefore, whether or not an offender has a stable home, a job and a place to live are all the court's business. Yet such inquiries rub some observers the wrong way, raising the specter of judicial paternalism run amok at the expense of such important judicial values as neutrality and impartiality.

For the uninitiated, a judge's relationship with an offender in drug court can be almost shocking. New York Judge Laura Ward's courtroom offers an example. Judge Ward is a no-nonsense personality. The daughter of a federal judge and herself a former prosecutor who worked on the team that put Gambino crime boss John Gotti behind bars, Ward is deeply respectful of the law and the power of tradition. Upon embarking on her career as a judge in the late 1990s, the last place she thought she'd end up was overseeing a drug court. “I didn't go to law school to monitor urines,” Ward says.<sup>25</sup>

Ward now finds herself doing things that would have been anathema to her as a prosecutor. When an offender with nine months sobriety says she has family troubles, Ward asks for the details. The woman explains that her 16-year-old daughter was arrested in another county for stealing a car. Ward shakes her head, as if to say she understands the suffering teenagers impose on their parents. “I know she's putting you through a lot,” Ward tells the mother, “but don't go back to drugs. It's not worth it.” Then Ward goes a step farther. Rather than merely impart some encouraging words, Ward offers to help. “If you think it might help, I'd be happy to talk to your daughter,” Ward says. The client smiles gratefully; she doesn't seem at all surprised by the offer. Ward makes clear her willingness to help by adding: “Maybe if it comes from a judge, it might have an impact.”

Indeed, this notion – that judicial authority still carries weight, that judges can make a difference – goes to the heart of the problem-solving enterprise. “I've found that we as judges have enormous psychological power over the people in front of us,” says Judge Rosalyn Richter, a former judge at the Midtown Community Court. “It's not even coercive power. It's really the power of an authority figure and a role model. You have power not only over that person, but over their family in the audience, over all the people sitting in that courtroom.”<sup>26</sup>

Some fear that this power leads easily to a paternalistic judiciary. Steve Zeidman of the Fund for Modern Courts voices the sentiments of many when he says: “[Problem-solving courts] are bringing [offenders] into the legal system and then in the course of providing much-needed help, we subject them to fair amounts of social control...The danger of 'Big Brother' is very real.”<sup>27</sup> John Stuart, the Minnesota State Public Defender, writes:

The defense lawyer's job often is to ask people to look at both sides of the story. A public defender's perspective on "problem solving courts," therefore requires two points of view: problem solving courts can be just great. And they also can be very, very dangerous. Above all, they should not make the mistakes that have been made [in the past]...Juvenile court, for example, was started in 1899 with the highest possible aspirations and ideals – and incorporated due process of law only in 1967.<sup>28</sup>

Colorado Judge Morris B. Hoffman echoes Stuart's concern about problem-solving judges operating outside of due process: "I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to 'do good' rather than to apply the law."<sup>29</sup> He describes drug-court judges as "a bizarre amalgam of untrained psychiatrists, parental figures, storytellers and confessors.... Judges have become, in the flash of an eye, intrusive, coercive and unqualified state psychiatrists and behavioral policemen, charged with curing all manner of social and quasi-social diseases, from truancy to domestic violence to drug use."<sup>30</sup>

Problem-solving judges offer two responses to these concerns. First, they argue that even the worst excesses of their brethren fall within the range of accepted judicial behavior. They point out that paternalism is always and forever a concern among judges. And while some of the judging that happens in a problem-solving court may be unconventional – judges applauding offenders, offering advice about child-rearing, etc. – there is plenty of odd judicial practice in conventional courtrooms as well, including judges who have been accused of exaggerated leniency and others accused of imposing extremely unusual punishments.

More convincingly, some problem-solving advocates suggest that problem-solving is not a departure from the judicial norm, but rather part of a rich tradition of an engaged judiciary. For example, New York Judge Juanita Bing-Newton has argued that,

the process of judging, where judges use their authority to form an informed response to social problems, is simply not new, it is not unusual. It is what we do. *Brown v. The Board of Education*, for example, comes to my immediate mind. And so, just as it is appropriate for judges to have informed responses to public macro issues, I think it is similarly appropriate for us to have those informed responses to micro personal issues, such as drug addiction for individuals, particularly when we know that it has [an] effect in the public milieu.<sup>31</sup>

## In the Courtroom

How do these issues – of paternalism, accountability and the limits of judicial authority – play themselves out in the courtroom? It's worth returning to where we started – with Judge John Leventhal and the Brooklyn Domestic Violence Court.

Leventhal has presided over the court for six years now. He endeavors to communicate directly with each defendant who comes before him. Rather than let an order

of protection speak for itself, or trust that a defense attorney will review the details of the order with his client, Leventhal looks every defendant in the eye, and explains: “Mr. Smith, this order of protection is my order of protection, not your wife's. If she invites you over to dinner, it will be the most expensive dinner you ever had because the next night you will be eating dinner in jail.” And because Leventhal retains a case from indictment through post-disposition, he truly gets to know the defendants – and they get to know him. By frequently bringing defendants back to court for monitoring, Leventhal sends a message that he's personally interested in the case and that he's closely following the defendant's compliance.<sup>32</sup>

Judge Leslie Leach, who presides over a drug court in Queens, interacts not only individually with clients, but with the entire court audience. As he enters his wood-paneled courtroom, Leach shouts a general greeting. “Good morning everyone,” Leach says. “How are you doing?”

The offenders in the audience answer with a chorus of positive replies: “good,” “fine,” “OK.”

Leach then asks a question, singling out a client in the audience: “Springtime they tell me is a tough time for recovery. Mr. Lloyd, why is springtime hard?”

“You're out more and can get into trouble,” Lloyd replies.

Leach nods affirmatively. “That's right,” he says, and then quotes a favorite 12-Step slogan: “Don't forget: People, places and things.”

Across town, in Judge Laura Ward's Manhattan courtroom, the approach is very much the same. Before every appearance, Ward holds a case conference with the court case manager, prosecutor and defense attorney so that when the defendant appears before her, Ward knows exactly what's going on, including the results of urine tests, attendance history at the treatment program and even the clinical observations and concerns of treatment staff.

“It says here that you're a follower and that you've started hanging out with the wrong crowd. That concerns me,” says the judge, addressing a teen-aged defendant as she looks over a treatment counselor's report. The teenager explains that it gets lonely in his residential program. “Maybe you can find some other people to hang out with,” says the judge, “people who won't lead you into trouble.”

She then suggests that perhaps the teen should also strive to be a leader; rather than follow others, he should try to set a good example for his peers. The youth listens intently to the judge, nodding slowly. “I know you can do it,” the judge says, encouragingly. “I'm keeping my fingers crossed that when you come back next month, I'll get a glowing report describing what progress you've made.”

Ward draws from many sources in her conversations with defendants, including note cards on which she records personal data: this defendant has a baby, this one has an ailing parent, this one is applying to technical school. When she wants to be encouraging, these little facts work their way into her conversations with defendants. “How's the baby? Being a parent sure can be challenging.” She calls one middle-aged man to the bench to show him his arrest photo. “See how awful you looked?” she said, holding up an image of despair – hair matted, swollen face, bewildered and



hopeless. The man before Ward today is alert, hair combed, eyes far brighter. “You look great. You really do,” the judge says. He nods knowingly as Ward encourages him to continue in treatment and maintain his sobriety.

To clients who are doing well, Ward offers boundless encouragement. But to those who have repeatedly failed, Ward is uncompromising. “I’ve given you two chances at treatment already. Why should I give you a third?” she asks one defendant. She makes a teenager spend the morning writing an essay explaining why he thinks she should be lenient after he left his residential treatment program without permission. In another case, she unleashes an angry lecture about a defendant’s repeated failure to comply with the court’s treatment plan and his disrespectful attitude toward court staff before imposing a sentence of three-to-six years in prison.

Ward’s manner is, in some respects a performance, a form of theater that is not merely for the benefit of the individual client, but for everyone in the courtroom. Judges frequently organize their calendars for maximum effect. Thus, offenders who are doing well in treatment are often the first called – not merely to reward them for their achievement, but to let the successful participants serve as an example for other offenders.

### **The Team Approach**

Whether a judge is an accomplished performer like Ward and Leach or more reticent, the bottom line is that a problem-solving judge is no longer merely a neutral fact-finder, but an active participant in proceedings. Drug courts in particular extol the idea of the judge as the leader of the court “team,” which includes defenders and prosecutors as well as social workers. “Because it’s a team approach ... you aren’t fighting all the time with everybody,” says Florida Judge Melanie May, “We all work in the same direction.”<sup>33</sup> Adds Judge Leach: “We’d like to think that the best interest of the defendant in treatment is the goal we all seek.”<sup>34</sup>

The concept of “teamwork,” and the idea that everyone in the courtroom, including the judge, is a “team player” is an important feature of many problem-solving courts. This idea makes some observers nervous. After all, if defenders and prosecutors are now part of the same team, what’s left of adversarialism, a defining principle of our justice system?

“The obvious risk,” writes Lisa Schreiberdorf, director of Brooklyn Defenders Services, “is the erosion of zealous defense advocacy as the three participants – judge, prosecutor, and defense attorney – begin to consider themselves ‘teammates.’”<sup>35</sup> Judge Jeff Tauber, former president of the National Association of Drug Court Professionals, says “defenders need to look at this as a new approach that requires a level of teamwork and partnership that is not often seen. It requires defenders to take a step back, to not intervene actively between the judge and the participant, and allow that relationship to develop and do its work ...It really does demand that they partner and work very closely with both the court, treatment, and their former adversary, the prosecutor.”<sup>36</sup>

Many defenders are uncomfortable with the expectation that they “take a step back.” Mae Quinn, a public defender in the Bronx, argues that defense attorneys may

feel pressure from judges, prosecutors and other “team” members not to raise objections to the treatment mandate or scope of a proposed sanction.<sup>37</sup>

Kathleen M. Cantella, a deputy public defender in Los Angeles County, strives to be a team player in drug court, and yet her cooperative spirit is tempered by vigilance. “I sit there quietly most of the time. I learned to cut the lawyer yap because the traditional public defender shtick isn't what these clients need,” Cantella says. “But once in a while, I think I might hear something coming, and I have to jump up...I have to ask my client to tell me what they're about to say, just to make sure they're not about to admit to some murder 20 years ago.”<sup>38</sup>

While defenders' caution about problem-solving is understandable, it is worth noting the lawyering that does take place in problem-solving courts. For example, in a drug court, up until a defendant opts to participate in treatment, the defense attorney is (or at least should be) engaged in advocating for the best possible deal for his client. In addition to contesting the merits of each case, defenders in drug courts also argue about eligibility criteria, the length of treatment sentences, and appropriate treatment modalities (for example, outpatient versus residential.)

## **Judicial Independence**

In addition to keeping an eye on the quality of advocacy in her courtroom, a problem-solving judge has to remain equally vigilant to preserve judicial independence. The question for judges is: Does participation in a problem-solving court compromise a judge's responsibility to make independent decisions? This question needs to be addressed if problem-solving courts are to operate within the code of judicial ethics – and if they are to persuade the judicial establishment, the bar and the public that they are not tampering with fundamental legal principles. Judicial independence, after all, “ranks high in our nation's bundle of values,” says Shirley Abrahamson, chief justice of Wisconsin's Supreme Court. Among other things, it enables judges “to resolve disputes free from threat of physical harm, financial interest, or popular or political pressure.”<sup>39</sup>

Although we've been speaking of the team as a troika – involving only defense attorney, prosecutor and judge – the team in most problem-solving courts also includes court-based case managers, treatment providers, probation officers and others. A judge's job involves not only managing events inside the courtroom, but also managing the team: Have all relevant voices been consulted? Are team members providing timely and useful information? Are they being held accountable for their actions? And, when a conflict arises, does the judge have the distance and the clarity to resolve the dispute in a manner consistent with the law and the goals of the court?

“I wasn't trained in addiction or psychology,” Judge Laura Ward of the Manhattan Treatment Court points out. “I need people who are experts in these areas to give me information.” Ward, like many judges in problem-solving courts, believes that it's her job to weigh the information from the team, to consider all sides, and then to render judgment; in that way, she preserves her judicial distance and neutrality. “I always listen to what they have to say, although the final decision is always mine to make,” she says.

Others aren't so sure. Jo-Ann Wallace of the National Legal Aid and Defender Association, worries about problem-solving courts relying too heavily on "expert" advice: "The danger lies in problem-solving courts' overstepping – basing sentencing decisions on the court's interpretations of social science research."<sup>40</sup>

Working within a "team" raises another important concern for judges – the danger of ex parte communication. Law professor Cait Clarke describes a disturbing field trip her criminal justice class took to a drug court: "We were brought behind the scenes when all of the players were at the table and the negotiating was going on about case resolution. My students turned to me and asked: where's the defense lawyer? They weren't in the room." Clarke says the judge didn't think "he was having an ex parte experience... because the defendant had already pled guilty... He felt that they were in the therapeutic stage. I think he thought that they were simply caring for a client."<sup>41</sup>

Clearly, judges, in relying on the advice of experts, need to be careful not to exclude defenders – or prosecutors, for that matter – from the discussion. "What concerns me is that a problem-solving court would decide that the most effective way to deliver treatment is by having the professionals decide it without littering up the room with obstructionist lawyers," says Judge Truman Morrison.<sup>42</sup> Judge Judy Harris Kluger, who oversees New York City's criminal courts, agrees that "there should never be a discussion about a case and a defendant without the prosecutor and the defense counsel being present."<sup>43</sup>

Some also question whether judges, by working in a court with a narrow focus – such as domestic violence or drug treatment – will eventually succumb to the undue influence of advocates with whom they come into regular contact. Writing about domestic violence courts, Susan Keilitz of the National Center for State Courts, notes that "specialized judges can lose their neutrality, or the appearance of neutrality, by becoming more educated to the effects of domestic violence and collaborating with the advocacy community."<sup>44</sup>

While acknowledging the potential pitfalls, many problem-solving judges are quick to point out the benefits of enhanced teamwork and collaboration. Judges in problem-solving courts say they receive far more information on which to base a decision than would otherwise be available in a conventional court. And the more information a judge has, the better he or she is equipped to make a decision, they say.

At each court appearance, a problem-solving judge is provided with a detailed report: Has the defendant been attending AA meetings? Has the defendant abided by orders of protection? Has the defendant stayed clean? What potential obstacles, if any, threaten the defendant's future compliance with court orders? With this information, the judge can use her authority to prevent little slips from turning into major violations, and can react swiftly and sternly to situations that might threaten public safety. Theoretically, judges in conventional courtrooms should have access to similar information – from pre-trial agencies, probation departments and lawyers – to make sure all the facts, all the mitigating circumstances, all the issues that really

matter are weighed before a decision is made. The reality is that few of them get information as detailed, accurate and up-to-date as problem-solving judges do.

To understand how a problem-solving court helps judges access information, consider the experience of Judge Leslie Leach. Before Leach took charge of the Queens Treatment Court in 1998, he sent a number of offenders into treatment on his own. Unfortunately, he says, he didn't have a complete understanding of addiction and the process of recovery; he also didn't know very much about the programs to which he was referring offenders. "When I did the cases on my own, I'd say, 'How is she doing? Is she OK?' but I didn't know about the details of treatment – what orientation was, what it was like working in the kitchen, doing door duty, what a contract was."<sup>45</sup>

To do an effective job, Leach needed more information, the kind of information that is routinely available to him through the apparatus of the problem-solving court. Now he gets detailed reports on the progress of each offender. He regularly meets with representatives of treatment agencies and visits their facilities. And he has access to the latest research and best practices in the field of substance abuse treatment thanks to the court's specialized staff.

"Now that I know what all those things are, it allows me to be more effective. I'm talking directly to the defendant and I can forewarn them that a contract is difficult, and I can give them advice for getting through it," Leach says. "The drug court has given me greater insight into where the client stands, what his needs are and how to proceed effectively."<sup>46</sup>

Judge Jo Ann Ferdinand, who has presided over the Brooklyn Treatment Court since its inception in 1996, tells a similar story. "Problem-solving courts allow judges to develop a substantive expertise in a particular area," she notes. "When I was in Criminal Court, I used to give defendants one chance at drug treatment, and if they messed up, I would give them a harsher sentence or disposition. But since presiding at the Brooklyn Treatment Court, I've learned that recovery is not an event; it's a process. It's not all or nothing. Giving them just one shot at rehabilitation is not helpful. At the Treatment Court, I follow defendants' progress in treatment and try to maximize their chances for success."<sup>47</sup>

Ultimately, the impact of problem-solving courts on judicial independence may come down to the personality of individual judges, just as it does in conventional courts. As anyone who has practiced in criminal court knows, some judges rely heavily on the advice of experts, others do not. Some judges are known as soft touches, others are notorious for being hanging judges. The point is that while our courts are designed to promote the rule of law, judicial temperament always has an impact on how a case is decided. Although we have long strived for a court system devoid of bias and inconsistency, the reality is that any system designed and implemented by humans will always be idiosyncratic. The relevant question is not: do problem-solving courts have the potential to negatively impact core judicial values like judicial independence, but rather: are they any more likely to undermine these values than conventional courts?

## Working with Communities

Another concern raised about problem-solving judges involves their active engagement with the local community. They speak before community groups; they participate in advisory boards designed to air community concerns; some may even advocate for new community resources or programs. Problem-solving judges reach out to the community in an effort to achieve a number of goals: to better understand the context in which crime occurs so they can fashion better dispositions; to build more effective partnerships between the court and social service providers; and, ultimately, to improve public trust and confidence in justice.

This orientation challenges the traditional picture of a judge as someone isolated from worldly events. Isolation has, in fact, become synonymous with judicial purity and objectivity. A judge in isolation is “above the fray” and thus inoculated from charges of bias or undue influence. This caution among judges has translated into a code of conduct that expects judges to be circumspect in all their dealings with the community.

It's worth noting, however, that this culture of isolation is not required by the Judicial Code of Conduct, but is socially prescribed. Indeed, the Judicial Code of Conduct bars judges from commenting on a pending or impending case, but it “does not prohibit judges from making public statements in the court of their official duties or from explaining for public information the procedures of the court.” The code also notes that “ [a] judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects... As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice.”<sup>48</sup>

Judges in problem-solving courts recognize that isolation has a price. One consequence of isolation is that many judges have only the dimmest understanding of the impacts their actions have on the community. For the community, the price is often a loss of faith in the workings of the court. “The reason there is diminishing confidence in judges generally is because judges have isolated themselves from the communities we serve,” says Judge Veronica Simmons McBeth, presiding judge of the Los Angeles Municipal Court. “We don't go out into the community and listen to what their concerns are.”<sup>49</sup>

For judges in problem-solving courts, understanding community concerns is an essential requirement of their work on the bench. A community court, for example, depends on input from citizens in order to respond to community problems and develop effective solutions. While many judges might question the value of engaging the community, judges in problem-solving courts say the insight they gather by meeting regularly with the community has proven to be invaluable. In fact, both courts and communities can realize gains. Communities can educate judges about the realities of life in their neighborhood, while judges have an opportunity to explain how the judiciary really works.

Judge McBeth offers this example. As she explains, a citizen of Los Angeles wrote her a letter that said, in effect: “Dear Judge McBeth, I have heard an awful lot about

you, and, boy, it was all bad.” The letter writer went on to describe problems in the community, such as rampant prostitution and drug dealing. McBeth called the writer, who invited McBeth to attend a civic association meeting. Curious about what she would hear, McBeth decided to attend:

When I went there, two important things happened. One, I had a chance to find out why they were mad at me. They thought the role of the supervising judge meant I could tell all 52 judges who sit in criminal court in the City of Los Angeles how to sentence, right? ...once I explained to them how important it is that judges are independent when they make their individual sentences, they all agreed and thought it was good...But the most important thing that happened at that meeting was I stayed and listened to all the problems that they were having.<sup>50</sup>

The Midtown Community Court in New York offers another example of judicial-community interaction. The Midtown Court brings the judge, court staff and community members together for monthly meetings to discuss neighborhood conditions. Community residents let the court know about “hot spots” where crime is concentrated, and the court works with community members and other agencies to address the problem. Among other things, the court has helped organize community clean-ups, worked with local property owners to improve street lighting to discourage crime, and deployed teams of social workers to link homeless people to services before they get into trouble.

Aware that some observers would worry that the court was violating the separation of powers doctrine and treading upon the territory of the legislative and executive branches, judges at the Midtown Court did not dive thoughtlessly into working with the community, but rather took a cautious approach. “In the early days of the Midtown Community Court, there were many judges – and I must say that I was one of them – who worried that by meeting with the community we would be opening the court up to criticism,” says Judge Judy Kluger, the Midtown Court’s first presiding judge:

It was something I was very concerned about initially. But I realized that we are public officials and there is nothing improper or incorrect with us speaking to members of the public. I had been afraid that people would talk about particular cases and would try to influence me in some way, but I realized after the first advisory board meeting that I attended that they just wanted to express their appreciation for the court and have an interaction with the judge. The meetings created a spirit of partnership and collaboration that allowed community members to embrace ideas such as having defendants perform community service in their neighborhoods. They even volunteered ideas for where to send defendants and what they

should do. The meetings resolved any distrust between the court and the community and were beneficial in helping the court grow.<sup>51</sup>

It is not only judges in community courts who have come to think of themselves as brokers and conveners. Judges in a range of problem-solving courts have made working with people and organization outside the courthouse a basic part of their work. Judge Leventhal in the Brooklyn Domestic Violence Court, for example, hosts monthly meetings in the courthouse that bring together prosecutors, defenders, victim advocates, batterers-intervention programs, service providers, religious leaders and community activists. At one meeting, Leventhal learned from corrections department officials that they almost never knew when an order of protection was in effect. That meant that prisoners could, with impunity, write or call their victims from jail. In response, Leventhal and the domestic violence court developed a protocol for keeping jails informed about the orders of protection that pertain to their prisoners – and encouraged jails to punish any violations.

## Why Do It?

No examination of judges in problem-solving courts can be complete without asking a fundamental question: Why have judges around the country decided to create or participate in these novel courts, which seem to raise as many questions as they answer? The short answer is dissatisfaction – dissatisfaction with their jobs, with the tools at their disposal and with the “revolving door” that returns the same offenders to their courtrooms again and again.

One of the biggest frustrations for criminal court judges is the sense that their decisions don't really matter – that despite sentences of probation and jail, offenders eventually get arrested again and communities never become appreciably safer. Almost any state court judge can relate to the experience of Judge Legrome Davis, who oversees criminal courts in Philadelphia. “In the course of one year, I had 5,000 felony defendants plead in front of me and get sentenced,” Davis says. “I spent the next five years of my life watching them come back to court with an array of problems.”<sup>52</sup>

Judge Ward tells a similar story: “Sitting in arraignments, I quickly realized that jail wasn't the answer. You'd put them in jail on Monday for a crack pipe, only to have them back in court on Wednesday for something new.” On the other side of the country, Judge Stephen Manley of the Santa Clara drug court echoes the very same sentiments. “I've spent most of my career as a judge working with criminal cases,” Manley says:

...When you begin sentencing the children of those you sentenced ... you have to ask yourself, 'Have you made any change? Have you brought about anything you intended to by your sentencing previously?' When you see that [what you're doing] is not having any desired effect in reducing recidivism, or changing people's lives, or effectively protecting

victims, or having accountability, then you begin to question why we're doing the same thing over and over again.<sup>53</sup>

What Manley is describing is a conversion narrative experienced by many problem-solving judges – the moment the light bulb went off and they realized that the way they had been taught to handle cases was not having the desired effect. Almost invariably, this is what drives judges to try a problem-solving approach. Many who have taken this step do so over the objections of their colleagues on the bench. And many do so despite having their own reservations about the potential implications for their professional identity and the integrity of courts as an institution. Judge Leslie Leach of New York, for instance, still wonders if he's helped or hurt his career by presiding over a drug treatment court: “I still sometimes wonder if serving in a drug court is a plus or minus. Should I be doing more trials? Should I be handling more high-profile cases?”<sup>54</sup>

The courage that it took for the first generation of problem-solving judges to make this step – to serve in a problem-solving court – should not be underestimated.

### **From the Margins to the Mainstream**

One of the challenges that confronts the problem-solving movement (if it can be called that) is how to reach beyond the first wave of problem-solving judges to engage the rest of the judiciary, many of whom will be quite resistant to the idea of tinkering with their traditional role.

Or will they? There are some hints that state court judges may be more open to the idea of problem-solving than it might appear at first glance. To get a handle on judicial attitudes towards problem-solving, in the fall of 2001 we commissioned researchers at the University of Maryland to survey more than 500 state court judges about problem-solving courts and the issues they address.

What we found was that a surprisingly large percentage of judges – whether they knew about problem-solving courts or not – were eager to assume a larger role in addressing the many underlying issues that bring offenders to court. For example, over 80 percent of the judges surveyed said judges should be involved in helping to reduce drug abuse among defendants. A similar percentage agreed that judges should play a role in protecting domestic violence victims from continued violence and helping get mentally-ill defendants into treatment.

Ninety percent of the judges surveyed reported that they wanted to be involved in ensuring that substance-abusing defendants attend court-ordered treatment and that defendants in domestic violence cases attend batterers intervention programs. And over 60 percent of the judges said they should work with community groups on neighborhood safety and quality-of-life concerns.

The survey offers a snapshot of a pro-active judiciary increasingly willing to roll up its sleeves and get involved in addressing the kinds of problems they see on a daily basis. This willingness to take on new responsibilities, and to tackle the underlying problems that bring people to court, is particularly noteworthy because it represents a fairly dramatic departure from the conventional wisdom about judicial



attitudes. As recently as 1989, judges generally favored a hands-off approach to problems like drug addiction and domestic violence.

John Goldkamp of the Crime and Justice Research Institute recalls attending a meeting that year at which “high-ranking court officials in the nine most populous jurisdictions spoke about court strategies that would process drug cases more quickly.” He says the officials “coolly ignored suggestions to develop court-based treatment approaches.” When one judge argued “that the answer was not to be found in making the machinery of justice spin faster, but rather in developing an effective strategy of court-supervised drug treatment in a way that had never before been attempted in the criminal courts,” the reaction from fellow judges was “embarrassed silence and out-of-hand dismissal of ideas that were viewed as being behind the times.”<sup>55</sup>

Today, of course, the response would be very different. In fact, in 2000 all 50 state court chief judges (together with all 50 state court administrators) unanimously passed a resolution endorsing problem-solving justice. One reason for this sea change in judicial attitudes is the research that has been published to date about the results that problem-solving courts have achieved. While there is certainly a need for additional study, the early findings suggest that problem-solving courts are making strides toward achieving their goals. This includes community court research that reports reduced local crime and disorder; drug court studies that document reduced drug use and recidivism among drug court participants; and domestic violence court research that tracks significant reductions in dismissal rates for domestic violence offenders.<sup>56</sup> “Judges see a lot of failure and not many successes, but since I’ve been at the drug court, I’ve seen quite a few successes and that spurs me on,” says Judge Joseph Valentino of Buffalo, New York.<sup>57</sup>

Just as important as the results have been the high satisfaction levels reported by the first generation of problem-solving judges. “Let me tell you about a colleague of mine on the bench,” says Judge Truman Morrison,

“He’s actually the senior judge in our court, who everybody would define as a traditional judge, to the extent we all have a stereotype of that. Years ago, he served as the judge in our local drug court. Yesterday, he absolutely shocked me by saying that his year on the drug court was the single most meaningful experience he’s had in 22 years of being a judge. I said: ‘Gosh, that surprises me. Why is that?’ He said: ‘Because in many ways I was able, with complete fidelity to all my principles, to do a better job of being a judge in that context than I ever was doing anything else.’”<sup>58</sup>

For many judges, it boils down to this: “You really have a chance to make a big difference in the lives of people,” says Judge Sharon Chatman, a California drug court judge.<sup>59</sup>

## Conclusion

This essay has attempted to highlight some of the key issues confronting judges who preside over problem-solving courts, as well as some of the benefits these new experiments offer the judiciary. To date, the major concerns identified by the judges, attorneys and scholars about the role of problem-solving judges fall into the categories: inside the courtroom and outside the courtroom. Inside the court-

room, problem-solving courts have asked judges to alter their behavior in ways both profound and subtle. This includes welcoming new players into the process, monitoring the provision of (and compliance with) social service sanctions and focusing the energies of the court on addressing the problems of defendants, victims and communities. These changes have raised concerns about judicial paternalism, reduced adversarialism, ex parte communication and the appropriate limits of judicial authority.

Outside the courthouse walls, problem-solving courts have asked judges to reach out to communities, to broker relations with government and non-profit agencies and to think through the real-life impacts of judicial decisions. As judges have performed this work, they have called into question the independence and neutrality of the judiciary and even the separation of powers doctrine.

These concerns – some serious, some minor; some real, some imagined – must be weighed against the perceived benefits of problem-solving courts. Among other things, problem solving courts have demonstrated the potential to increase judicial access to information, improve the accountability of both offenders and service providers, and bring new resources into the courthouse. Just as important, early research findings suggest that problem-solving courts can make a difference in addressing discrete social problems and bolstering public confidence in justice.

Is it possible to have the best of both worlds? That is, is it possible to imagine that the future development of problem-solving courts will continue to build on the impressive track record of problem-solving courts to date while taking steps to mollify concerns about the judicial role? This may well turn out to be the decisive question facing thousands of innovators if they hope to make problem-solving standard practice within state courts.

Notes

1. Judith S. Kaye, "Lawyering for a New Age," Fordham University Law School, Sonnett Lecture, (April 8, 1998).
2. "Judicial Roundtable: Reflections of Problem-Court Justices," p. 14, New York State Bar Journal, (June 2000).
3. It wasn't until the end of the 19th century that three states (Maryland, Delaware and Oregon) outlawed wife beating – and then it took more than a half century more for domestic violence to enter the nation's consciousness as a serious social problem. See Betsy Tsai, "The Trend Toward Specializes Domestic Violence Courts: Improvements on an Effective Innovation," 68 Fordham Law Review 1285 (March 2000).
4. Betsy Tsai, "The Trend Toward Specializes Domestic Violence Courts: Improvements on an Effective Innovation," 68 Fordham Law Review 1285 (March 2000) p. 1292.
5. Emily Sack, phone interview by Robert Victor Wolf (Nov. 29, 2001).
6. Susan Keilitz, "Specialization of Domestic Violence Case Management in the Courts: A National Survey," National Center for State Courts (2000) p. 3.
7. Id., pp. 3-4.
8. Dag MacLeod and Julia F. Weber, "Domestic Violence Courts: A Descriptive Study," Judicial Council of California, Administrative Office of the Courts (May 2000) p. 3.
9. Dierdre Bialo-Padin, chief of the Brooklyn District Attorney's domestic violence bureau, interview in her office by Robert Victor Wolf (Nov. 29, 2001).
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