

connections with family members, and raise their own children. I have seen a child stand up in a crowded audience and proclaim, "Mom, I'm proud of you."

For me, the only thing better than hearing statements like these is hearing from the judges themselves—hardly revolutionaries—many of whom for years have presided over a docket of recycling addicted offenders. Their message: "This is what I became a judge to do."⁵⁵ One drug court judge initially resisted accepting that assignment, but after two years he declined the opportunity for reassignment to another court part.⁵⁶ Quite frankly, for me as Chief Judge, these firsthand evaluations from people I respect are compelling evidence from the front lines of the value and effectiveness of these courts.

The success stories from our drug courts are only the anecdotal evidence. In 2000, I appointed a blue-ribbon Commission on Drugs and the Courts headed by former United States Attorney for the Southern District of New York Robert Fiske, that spent the better part of a year studying drug courts. At the conclusion of its study, the Commission issued an exhaustive report recommending that judicially monitored treatment be extended throughout New York State.⁵⁷ Acting on that recommendation, we expect by the close of 2003 to have more than 6,000 active participants in our drug courts.⁵⁸

III. DOMESTIC VIOLENCE COURTS

My third example of problem-solving in New York concerns domestic violence, another modern-day scourge. Just to give you some sense of the dimension of this problem, between 1984 and 1995, domestic violence case

55. I heard these precise words spoken at a graduation ceremony by a New York City Family Court Judge, but many judges have expressed the same sentiment to me. By coincidence, only months ago, while I was on vacation in upstate New York, the local paper carried an article about a retiring judge who disclosed that he was initially pessimistic about family treatment court, but was subsequently sold on the program after seeing the progress of its participants. In his words: "That was one of the highlights of my life experience, that treatment court." Don Lehman, *Judge Reflects on Decades of Service: Austin Cites Family Court, Drug Court, as Career Highlights*, POST-STAR (Glens Falls, N.Y.), Aug. 18, 2003, at B5; see also Emer Scott, *Judge Jo, the Queen of Care*, MANCHESTER EVENING NEWS, Sept. 25, 2000, at 19 ("The drug court is the most satisfying thing I have ever done as a judge."); see generally *Judicial Roundtable: Reflections of Problem-Court Justices*, 72 N.Y. ST. B.J. 9, 12-14 (2000) (containing comments of several judges who have presided at problem-solving courts).

56. This was State Supreme Court Justice Joseph D. Valentino of Rochester. In addition, Deputy Chief Administrative Judge Joseph J. Traficanti, who has headed our Office of Drug Treatment Programs since the fall of 2000, describes himself as initially "one of the doubters." Jim O'Hara, *Judge Praises Court, Grads*, POST-STANDARD (Syracuse, N.Y.), Feb. 1, 2001, at B3; see Terry Corcoran, *7 Graduate from Putnam Drug Court*, JOURNAL NEWS (N.Y.), June 26, 2003, available at <http://www.thejournalnews.com/newsroom/062603/b03p26drugcourt.html> (containing a former drug court judge's explanation that he originally worked against the idea of drug courts but became a drug court judge himself after attending Rockland County's first graduation).

57. N.Y. STATE COMM'N ON DRUGS & THE COURTS, *supra* note 41.

58. In January, the Office of Drug Treatment Programs estimated that there would be 5541 by September 2003. JOSEPH J. TRAFICANTI, OFFICE OF COURT DRUG TREATMENT PROGRAMS, THE SECOND YEAR: REPORT TO CHIEF JUDGE JUDITH S. KAYE 13 (2003), available at http://www.nycourts.gov/reports/drugtreatment/drugCourts_report02.pdf. Internal estimates bring that number to more than 6000 active participants by the end of 2003.

filings increased ninety-nine percent nationally.⁵⁹ In addition, in October 1995, New York began a Statewide Domestic Violence Registry, an automated data bank that allows judges and law enforcement to know immediately a person's prior domestic violence orders of protection and warrants.⁶⁰ Our Registry now exceeds one million entries. That is more than one million orders of protection reported to the Registry by the New York State courts in the past seven years.

I will start with my own education on the subject of domestic violence. Shortly before I became Chief Judge ten years ago, tragedy struck in an affluent community in Westchester County, north of New York City. Sadly, it often takes a tragedy to galvanize attention. A woman was bludgeoned to death by her husband of four years, who then jumped to his death from a nearby bridge. The wife, an educated, articulate woman, had appeared in Family Court weeks earlier. With no lawyer or victim advocate to assist her, she stood before the judge, asked for an order of protection, and received precisely what she requested: an order that allowed the husband to remain in the house but prohibited him from harassing her or removing their child. Her death was headline news, and the media heaped blame on the judge for permitting the husband to stay in the home.⁶¹ I wondered what more might have been done.

Not long after that, in Brooklyn, a Russian immigrant was murdered by her ex-boyfriend. While the ex-boyfriend was awaiting trial on prior charges of assaulting her and violating prior orders of protection, a judge modified the bail terms into terms the ex-boyfriend was able to satisfy. Shortly after his release, he went to the car dealership where she worked, shot her in the head, and then fatally shot himself. Again, press coverage was unrelenting, with blame heaped on the courts.⁶² Again I asked myself, what more could be done to prevent tragedies like these?

Sad to say, tragedies like these proliferate all across the nation, and they have many familiar elements, like murder-suicide and young children left

59. NAT'L CTR. FOR STATE COURTS, REPORT ON TRENDS IN THE STATE COURTS 34 (1997), available at http://www.ncsconline.org/WC/Publications/KIS_CtFutu_Trends96-97_Pub.pdf. From the opening of New York City's first drug court in 1995, through December 2002, more than 16,000 have participated in our adult drug court programs. See REMPEL ET AL., *supra* note 46, at 6, 7 tbl.1.1.

60. See N.Y. EXEC. LAW § 221-a (McKinney 2003) (requiring the Superintendent of the State Police, the Division of Criminal Justice Services, the Office of Court Administration, the Division of Probation and Correctional Alternatives, and the Division for Women to establish and maintain a statewide computerized registry of specified orders of protection issued in New York State and by courts of competent jurisdiction in other states).

61. See, e.g., Jonathan Bandler, *Westchester Family Court Judge Announces Retirement*, JOURNAL NEWS (N.Y.), Nov. 27, 1999, at 3B (stating the judge "came under fire in 1994 following the death of . . . the newspaper heiress"); Michael Moss, *Heiress' Mom: Judge Let Abusive Hubby Stay*, NEWSDAY (N.Y.), Jan. 8, 1994, at 2 (stating that the mother of deceased "blasted the judge who allowed her daughter's husband—now suspected in her beating death—to stay in the couple's home").

62. See, e.g., Press Release, New York City Mayor's Office, Mayor Giuliani Honors the Memory of Domestic Violence Victim Galina Komar, (Feb. 19, 1997), available at <http://www.nyc.gov/html/om/html/97/sp093-97.html>; Max Boot, *What Does It Take to Fire a Judge?*, WALL ST. J., Sept. 17, 1997, at A23 ("New York tabloids went into a frenzy.").

behind. They also remind us that family violence knows no boundaries. It can affect the most and the least privileged among us. In both of the cases I have described, there was an alleged history of violence but—again, not atypically—the women remained with, or returned to, their abusers. And perhaps most critically from my perspective, prior to each death the parties had been in court. Indeed, we know that recidivism rates are high and that many domestic violence victims die with judicial orders of protection in their pockets.

At some point during my first months as Chief Judge, I happened to see a video of a police officer in a patrol car, on his way to answering a woman's call that her husband was assaulting her. The woman's voice over the car radio begged the officer not to come to the house: "It was all my fault." "I overreacted." "Please don't come." But he persisted. Finally, he said, "Ma'am, if everything really is OK, please say a number between one and five." A pause. Then her chilling response: "Six."⁶³

The message was powerful. Clearly, domestic violence cases demand special skills and special training. The surface response, the ready answer, may not reflect the grim reality.⁶⁴ Recognizing this, our first step was to establish a Family Violence Task Force, which for the past several years has presented first-rate training sessions throughout the state for judges and court staff.⁶⁵ The idea is to raise awareness about the nature of domestic violence and encourage the sort of probing questions that need to be asked.⁶⁶

63. The video was entitled *Agents of Change*, produced by Victims Services Agency (now Safe Horizon). I viewed the video during one of the training sessions conducted by our Family Violence Task Force. Although that particular video is no longer in distribution, videos have become an important tool for education of the public as well as training of judges, police officers and others. See, e.g., National Resource Center on Domestic Violence, at <http://www.nrcdv.org> (containing a video list on its "Resources" page with the titles of more than 200 videos on the subject of domestic violence). Among the videos we have used in New York is the Academy-Award winning documentary *Defending Our Lives* (regarding battered women imprisoned for killing their abusers). See, e.g., Elizabeth Stull, *Court's Domestic Violence Series Continues with "Defending Our Lives:" Documentary Film Features Former D.A.*, BROOK. DAILY EAGLE & BULL., Oct. 17, 2000, at 8 (describing the film's showing during Domestic Violence Awareness Month).

64. In the view of one of the leading advocates for battered women:
Domestic violence must be understood as a planned pattern of coercive control that may involve physical, sexual, or psychological abuse rising to the level of torture as understood in human rights discourse. An understanding of domestic violence and human rights paradigms shifts battered women's call for justice away from victim-blaming pathologies toward a more accurate view of the systemic oppression of women evidenced in individual relationships.

Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 218-19 (2003) (footnotes omitted).

65. For a brief description of the Task Force and its programs, see JUDITH S. KAYE, THE STATE OF THE JUDICIARY 1999, at 14, available at <http://www.courts.state.ny.us/admin/stateofjudiciary/stofjudiciary/stofjud9/3%20family.pdf>. See generally Michael Dowd, *Dispelling the Myths About the "Battered Women's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567 (1992) (explaining how lack of knowledge about domestic violence in the legal system diminishes the battered woman's access to a fair trial, and describing Dowd's own lack of knowledge on the topic until he represented a woman who had killed her abusive husband).

66. Though still inadequate, public sensitivity to domestic violence was aroused beginning in the

We also began an experiment with the problem-solving approach, starting in Brooklyn, at first for the most serious of these cases, domestic violence felonies. With the help of many others—prosecutors and defense, criminal justice agencies, social service agencies, victims' advocates, community groups—we put our resources to work in a new and different way, beginning with an assigned courtroom and an assigned judge to work on these cases exclusively, from arraignment through plea, trial, and post-sentence monitoring.

Our focus, of course, is always on fairly judging the merits of each case, but in domestic violence cases we also want to take special care to ensure victim safety and defendant accountability. To reduce victim safety risks, a Resource Coordinator ensures that the court has all information available for decisionmaking.⁶⁷ To promote defendant accountability, the court monitors defendants closely, requiring frequent returns to court so that the judge can ensure there is no violation of bail conditions, orders of protection, or conditions of probation. Defendants know that they will be held accountable for any errant behavior.⁶⁸

Here too we have seen signs of success.⁶⁹ Signs of success in getting complainants to place greater trust in the justice system. Signs of success in reducing probation violation rates.⁷⁰ Success—and I say this always with fingers crossed, and prayer—in that there have been no fatalities in the cases before domestic violence courts.

As important as they are, the criminal domestic violence courts in New York are handling just a fraction of the cases involving family violence.⁷¹ The

early 1990s. Significantly, in February 1995, the American Bar Association launched a multi-disciplinary Commission on Domestic Violence, of which it was my privilege to be a member. See Roberta Cooper Ramo, *Ending the Violence: With Cooperation and Commitment, We Can Banish Domestic Abuse*, A.B.A. J., Feb. 1996, at 6; Steven Keeva, *Striking Out at Domestic Abuse: New ABA Commission Plans Interdisciplinary Programs to Aid Victims*, A.B.A. J., April 1995, at 115; Robert A. Stein, *Changing Attitudes About Abuse: Awareness, Education Are Linchpins of Domestic Violence-Prevention Effort*, A.B.A. J., Oct. 1996, at 106.

67. A special computer application assists the court in monitoring the case. See PAMELA YOUNG, AN INFORMED RESPONSE: AN OVERVIEW OF THE DOMESTIC VIOLENCE COURT TECHNOLOGY APPLICATION AND RESOURCE LINKS (2001), available at http://www.courtinnovation.org/pdf/info_response.pdf.

68. For a profile of the first presiding judge in the Brooklyn Felony Domestic Violence Court, Supreme Court Justice John Leventhal, see Lynda Richardson, *His Specialty and His Burden: Domestic Violence*, N.Y. TIMES, Apr. 25, 2001, at B2.

69. See Robyn Mazur & Liberty Aldrich, *What Makes A Domestic Violence Court Work? Lessons from New York*, JUDGES J., Spring 2003, at 5, 41-42 (describing the difficulty of defining and measuring success in domestic violence courts, but concluding that they play an important role in helping to eliminate family violence).

70. Probation Department statistics for the year 2000 suggested a decline in probation violation rates in Brooklyn's Felony Domestic Violence Court, although researchers found equivocal results in studying early cases for the year 1997. See LISA NEWMARK ET AL., SPECIALIZED FELONY DOMESTIC VIOLENCE COURTS: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE 69, 76 (2001), available at <http://www.urban.org/pdfs/DomViolCourts.pdf>.

71. Domestic violence cases can also be litigated civilly, and at times even concurrently with

sad truth is that families with domestic violence issues in New York can find themselves whipsawed among a variety of different courtrooms at the same time, including Family Court, a Supreme Court matrimonial part, and a criminal court. It is difficult to imagine, but as currently constructed, our fractured court system makes these families appear in separate locations in front of separate decisionmakers even though the underlying problem in each case is the same. The potential for inefficiency and redundancy is obvious. What may be less obvious is the potential for conflicting court orders and judicial decisions based on only a partial picture of the legal problems of the families before them.

In an effort to address this problem, we have created a series of Integrated Domestic Violence (or "IDV") courts to hear all cases involving a family with domestic violence issues—for this class of cases, in effect, a unified family court. We began with a few pilots, and in January 2003 announced a comprehensive three-year plan to replicate these courts statewide.⁷²

These courts, we believe, will better protect and assist victims, and better promote defendant accountability. IDV judges will know, for example, when an abuser sent to a court-mandated drug treatment program shows up intoxicated at supervised visitation with his children. There will be less opportunity for a defendant to slip through the cracks. More opportunity for the judge to monitor the abusers, to see that child support is paid and visitation and treatment orders are satisfied. Better linkages to social services and other resources to address family needs like housing, employment, and child care. Maybe, above all, more information that leads to better judicial decisions in individual cases, which, in a nutshell, is the goal of our integrated domestic violence courts.

IV. EFFECTIVENESS

Having described the origins and operations of problem-solving courts, I want to return to the questions posed at the outset of this essay: Do they work, and are they fair?

A generation ago, in 1974, Robert Martinson wrote an article for *The Public Interest* that examined prison-based rehabilitation programs and

criminal matters. New York's Family Courts have jurisdiction over "family offense" petitions in specified situations. In 2001, Family Courts had close to 60,000 family offense filings. TWENTY-FOURTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR, *supra* note 9, at 21. In addition, domestic violence matters can arise in divorce cases pending in New York Supreme Court.

72. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2003 6-7 (2003), available at <http://www.courts.state.ny.us/admin/stateofjudiciary/soj2003.pdf>. See New York State Unified Court System, *Integrated Domestic Violence Courts*, at <http://www.courts.state.ny.us/ip/domesticviolence/index.shtml> (providing information about the plan and courts that are already in operation).

concluded that they had no significant effect on recidivism.⁷³ Although subsequent researchers successfully challenged his conclusions on methodological grounds,⁷⁴ his bleak assessment that nothing works in many respects “cast a pall” over the criminal justice community that lingers to this day.⁷⁵

Looking back on three decades of debate about criminal justice reform, I think we have learned two important lessons. The first is the need to be realistic about our expectations—about what we can achieve as we take on complicated and deeply entrenched social problems like addiction, domestic violence, mental illness, and child neglect. We need to acknowledge that, despite our best efforts, problem-solving courts are not going to change every offender’s life. Some people will fail. Some people belong in prison. The innovations discussed here—enhanced treatment, special staffing, and judicial monitoring—can accomplish only so much in an individual’s life. They are not going to make up for problems like chronic poverty, substandard education, shoddy housing, and inferior health care.

Hand in hand with the need for realistic expectations is the need for solid research. Almost all of the experiments launched in New York State have rigorous evaluation plans.⁷⁶ We want to know not just whether they work, but why and for which populations.

It is still too early to offer definitive conclusions about the problem-solving approach. Some of our projects, like the IDV and mental health courts, are just months old. It takes years to track recidivism. It takes years to weigh program costs and benefits. It takes years to compare new practices to traditional ones.

73. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, THE PUBLIC INTEREST, Spring 1974, at 22-54.

74. One of the researchers whose work was summarized in Martinson’s article recently wrote:

[F]ew people who espoused the view that nothing works questioned the validity of the research on which it was based or understood the problems inherent in the design of most treatment programs and in the methodologies used to evaluate them. They also did not recognize the difference between the pessimistic viewpoint of the summary article [by Martinson] and the more guarded conclusion, arrived at by my colleagues and me, which left open the possibility that rehabilitation could work.

DOUGLAS S. LIPTON, U.S. DEP’T OF JUSTICE, THE EFFECTIVENESS OF TREATMENT FOR DRUG ABUSERS UNDER CRIMINAL JUSTICE SUPERVISION (1995), at <http://www.ncjrs.org/txtfiles/drugsupr.txt>. Lipton also notes that Martinson himself later acknowledged that “some treatment programs do have an appreciable effect on recidivism.” *Id.*

75. Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather but Nonetheless Essential) Facts, Ma’am: What We Know and Don’t Know About Problem-Solving Courts*, 30 FORDHAM URB. L.J. 1027, 1027-28 (2003); see John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 926 & n.17, 960-61 (2000); Rick Sarre, *Beyond “What Works?”: A 25 Years Jubilee Retrospective of Robert Martinson* 5 (Dec. 1999), available at <http://www.aic.gov.au/conferences/hcpp/sarre.pdf>; Jerome Miller, *Criminology: Is Rehabilitation a Waste of Time?*, WASH. POST, Apr. 23, 1989, at C3.

76. See Berman & Gulick, *supra* note 75, at 1035, 1038-40, 1041-48 (discussing studies of the New York family treatment courts, Midtown Community Court, and domestic violence courts); N.Y. STATE COMM’N ON DRUGS & THE COURTS, *supra* note 18 (studying drug court pilot programs).

Yet our experience has taught us quite a bit about the impact of problem-solving courts, and most of what we know is positive and encouraging. I want to highlight findings in five principal areas, beginning with recidivism.

A. Recidivism

In a recent review of drug court evaluations from across the country, researchers found that thirty-five of the forty-one studies showed reductions in recidivism among drug court participants compared to control groups.⁷⁷ In October 2003, the Center for Court Innovation released its evaluation of New York's drug courts in a report that I believe will be important not just to New York, but also to the field of criminal justice research.⁷⁸ It is the first multisite study that evaluates the impact of drug courts on recidivism by participants both while they are in a drug court program and after they leave. It also details the backgrounds of drug court participants, retention rates (how long participants stay in treatment), and predictors of successful treatment. Examining data from half a dozen drug courts, the Center found an average decline in recidivism of thirty-two percent in the year following program completion.⁷⁹ The impact of a reduction of this size is far-reaching—both for the future of the drug court participants and their families, and for the safety of communities and the functioning of our criminal justice system. It also has the potential for saving substantial amounts of money for the state.⁸⁰

B. Street Conditions

Independent evaluators from the National Center for State Courts spent three years investigating the Midtown Community Court and its effect on the

77. See REMPEL ET AL., *supra* note 46, at 118 (citing David B. Wilson et al., A Systematic Review of Drug Court Effects on Recidivism, Paper Presented at the Annual Meeting of the American Society of Criminology, at 11 & 23, March 2002).

78. The report, REMPEL ET AL., *supra* note 46, is among the first large-scale evaluations of whether drug courts have a long-lasting impact on criminal behavior. *Id.* at ix. Only Ohio has done a statewide study, and only a handful of studies addressed long-term impacts of drug courts beyond the first one or two years after entry into program participation. *Id.* at 13. Previous studies had been criticized “for failing to establish the long-term impacts of drug court participation—especially over a *post-program* period when participants are no longer under court supervision.” *Id.* at 9. See also *id.* at 117-24 (reviewing prior recidivism studies).

79. *Id.* at x. Among the study's conclusions are that drug courts “reduce recidivism when compared with conventional prosecution,” *id.* at 288, that their “impacts extend beyond the period of program participation,” *id.*, and that “[t]he exact magnitude of [their] impact varies across different sites,” *id.* at 289. The study also suggests that “while statewide institutionalization efforts will presumably want to promote statewide accountability and training, as well as some uniformity of key policy principles, it appears sound to promote a measure of local innovation, diversity, and adaptation to the available community-based resources.” *Id.* at 290. Questions about “best practices,” however, will persist, since “we do not adequately understand *how* and *why* drug courts work, and which approaches are most cost-effective.” *Id.*

80. See N.Y. STATE COMM'N ON DRUGS & THE COURTS, *supra* note 18, at 25-30 (outlining the financial benefits of treatment instead of jail).

streets of Manhattan.⁸¹ Street prostitution arrests dropped by fifty-six percent. Illegal vending dropped by twenty-four percent.⁸² Just as important, supervised work crews from the Court each year contribute tens of thousands of dollars worth of labor to the local community, repairing conditions of disorder like graffiti-marred buildings and trash-strewn parks.

C. Improved Accountability

One of the hallmarks of the problem-solving approach is accountability—ensuring, to the extent we can, that court orders are followed. Researchers tell us that compliance rates for community service at New York's community courts are consistently fifty percent higher than in traditional courts.⁸³ Meanwhile, the study of several New York drug courts shows that drug courts in the Bronx, Queens, Manhattan, and Tonawanda County have one-year retention rates exceeding seventy percent.⁸⁴ By way of contrast, addict stays in voluntary treatment programs over three-month periods range only from thirty to sixty percent.⁸⁵ These statistics support what common sense suggests: that judicial monitoring keeps addicts in treatment.

D. Stronger Families

The data shows that New York's family treatment courts are having a profound impact on the permanency planning process. Prior to the creation of these courts, children languished in the city's child welfare system for an average of more than four years while their parents' cases wended their way through the courts. By giving parents an immediate and realistic chance to get clean and sober, family treatment courts have reduced the average foster-care stay for these children to about a year.⁸⁶

E. Public Confidence

Last, increasing evidence suggests that problem-solving courts can help counter the erosion of public trust and confidence in justice that we have experienced in recent generations. In Red Hook, Brooklyn, for example, a poor,

81. See DISPENSING JUSTICE LOCALLY, *supra* note 26.

82. *Id.* at 7.

83. *Id.* at 7 (initial results showed fifty percent better compliance than traditional Manhattan courts); EXECUTIVE SUMMARY, *supra* note 32, at 2, 4 (compliance rate essentially sustained over three years).

84. REMPEL ET AL., *supra* note 46, 85-86 & tbl.8.1 (reporting retention rates, respectively, of seventy-two, eighty-one, seventy-three and eighty-two percent).

85. *Id.* at 85 ("Since attrition always increases over time, one-year retention rates across these same programs, if they were available, would presumably drop much lower than the 30-60% three-month range.")

86. N.Y. STATE COMM'N ON DRUGS & THE COURTS, *supra* note 18, at 67.

predominantly minority neighborhood with high levels of crime, seventy-two percent of local residents surveyed were aware of the Red Hook Community Justice Center and seventy-one percent of them viewed it favorably.⁸⁷ This contrasts sharply with a survey conducted before the community court opened, in which only twelve percent approved of the job that courts were doing in Brooklyn.⁸⁸

We have learned a lot from the first generation of research into problem-solving courts and undoubtedly we will learn more in the days ahead. Among the questions that researchers are currently studying in New York are these: Which is a more effective response to misdemeanor domestic violence—judicial monitoring or batterers' intervention programs? Are rewards more important than sanctions in motivating behavioral change among drug court participants?

There is one answer, however, that I do know: while the challenges of a contemporary urban criminal court or family court docket may be fierce, we can unquestionably find ways to meet them and do better. I am simply unwilling to adopt a despairing and defeatist attitude that "nothing works," or—put another way—"everything stinks, but don't change a thing."

V. FAIRNESS

Measuring the effectiveness of problem-solving courts is no easy matter, but at least we have recourse to studies, statistics, and surveys. Gauging the fairness of problem-solving courts is a far more challenging task. Does this new approach tilt the scales of justice? Does it shake the foundation of the adversarial system or compromise courts' ability to make fair and impartial decisions?

Any serious effort to address these questions must take place not in the world of abstraction but in the real world. It is crucial to remember the context out of which problem-solving courts emerged.

I wish I could tell you that our misdemeanor and family courthouses resemble the pristine temples of law you find in books. If you come to these courthouses looking for meaty motions and trials, you will be gravely disappointed. On a typical day in a New York City arraignment part, there are eighty or more cases before the court, which means that the judge and attorneys can devote just minutes to each.⁸⁹ Most of the cases, as I have discussed,

87. Greg Berman & Aubrey Fox, *Justice in Red Hook: An Experiment in Government-Community Collaboration 2* (2003) (unpublished manuscript, on file with the author).

88. *Id.*

89. This simple arithmetic assumes a judge can spend the entire day on the daily calendar of appearances, which does not even account for other activities, like studying written submissions, researching and writing opinions, conducting trials, performing ordinary administrative tasks, etc. In 1989, my predecessor Chief Judge pointed out that the typical court calendar in New York City Criminal

involve quality-of-life offenses or minor drug possession. The vast majority are disposed of at arraignment, many by plea to reduced charges and community service. Very few will ultimately go to trial. The rest will be settled in plea negotiations between the prosecution and defense.⁹⁰ The picture is no different in Family Court: scores of new cases on the calendar each day; little time for more than brief appearances before a judge; difficulty in finding counsel to appoint; frequent delays and adjournments; bargains often negotiated in hallway conferences.⁹¹

Lest you think this is a New York phenomenon, I offer this quotation from Chief Justice Kathleen Blatz, speaking about Minnesota's busy trial courts. In her words:

[J]udges are very frustrated. . . . I think the innovation that we're seeing now is a result of judges processing cases like a vegetable factory. Instead of cans of peas, you've got cases. You just move 'em, move 'em, move 'em. One of my colleagues on the bench said: "You know, I feel like I work for McJustice: we sure aren't good for you, but we are fast."⁹²

Clearly, compared to McJustice, carefully planned, well-operated problem-solving courts offer a far better opportunity for both prosecutors and defendants. That, I presume, is why District Attorneys, the Legal Aid Society, and other respected public defenders work cooperatively with us in these new initiatives.⁹³ That is why defendants choose to participate in, rather than challenge, these courts. What is the alternative is a question that needs to be answered by critics of a problem-solving approach.⁹⁴

Court consisted of 250 cases a day, leaving judges "at most two to three minutes to take meaningful action in each case." WACHTLER, *supra* note 14, at 5.

90. See TWENTY-FOURTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS, *supra* note 9, at 17 (stating that in 2001, forty-two percent of arrest cases in New York City Criminal Court were concluded by plea, thirty percent by dismissal, twenty-two percent by "other means"). Only two-tenths of one percent of the cases were resolved by verdict. *Id.*

91. See Charlie LeDuff, *Handling Sinners and Victims of Domestic Hell: Sad Hallways and Broken Lives in an Overburdened Family Court System*, N.Y. TIMES, May 28, 2000, at B1; Stephen J. Bogacz, *Family Court Faces Funding Crisis*, NEWSDAY (N.Y.), Mar. 14, 2001, at A24; Laura Mansnerus, *For Lawyers in Family Court, Preparing for Cases is Luxury*, N.Y. TIMES, Mar. 10, 2001, at B3.

92. Greg Berman, *What Is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000), available at http://www.courtinnovation.org/traditional_judge.pdf.

93. A variety of perspectives on problem-solving courts (from judges, prosecutors, defense attorneys, academicians, and researchers) were expressed at the Eleventh Annual Symposium in Contemporary Legal Challenges at Fordham Law School on February 28, 2002. The proceedings of this Symposium were published in the *Fordham Urban Law Journal*. See Symposium, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 FORDHAM URB. L.J. 1751 (2002).

94. For a more detailed critique of problem-solving courts, see, for example, JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* (2001); Hoffman, *supra* note 15; Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C.L. REV. 1437 (2000); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63 (2002). It is worth noting that the first article by Judge Hoffman cited above relies on data on "Drug Court Recidivism" in New York City in 1993, Hoffman, *supra* note 15, at 2070 n.29. However, in 1993, New York's first drug treatment court had not even begun operations, see *supra* note 43 and accompanying text. Hoffman's source, see Hoffman, *supra* note 15, at 2070 n.29, was STEVEN BELENKO & TAMARA DUMANOVSKY, PROGRAM BRIEF: SPECIAL DRUG COURTS (1993), at <http://www.ncjrs.org/txtfiles/spdc.txt> (reporting that "53.5 percent of the 'N Part' cases and 50.9 percent

But “compared to what?” and “what’s the alternative?” are not the end of my answer. Indeed, I think it is worth lingering for a moment on the roles of the judge and defender in a problem-solving court.

Drug courts, for example, until the treatment phase, can look very much like conventional courts before a plea is entered. Lawyers argue about eligibility criteria, the length of treatment mandates, and appropriate treatment methods, like whether a defendant merits residential or out-patient treatment. Judge, prosecutor, and defender perform their roles much as they do in any court.

In the next phase, however, when the focus is on defendant’s success in treatment, there is an understandable concern about ethical obligations and a need for heightened sensitivity both in the design of these courts and in daily practice. Serious questions may arise, such as sanctions for relapses and possibly even failure. It should be clear that a judge’s engagement with drug court defendants in no way diminishes or obscures the court’s responsibility at all times to retain the role of impartial, independent decisionmaker and guardian of legal rights. Nor do defense counsel cease being their clients’ advocates. In the words of one problem-solving judge, counsel always have “to take care that cooperation does not turn into capitulation.”⁹⁵

While I cannot deny that there may be bad practice in some problem-solving courts,⁹⁶ just as there may be bad practice anywhere, these courts have been planned to avoid unfairness by assiduously including both prosecutor and defense among the planners and implementers, and by closely overseeing these courts in daily practice. That there may be issues, moreover, is not a condemnation of the problem-solving idea, but rather a signal, or reminder, of

of those processed through other parts were rearrested”). In 1993, New York City operated Narcotics Parts (“N Parts”), which were not treatment courts. Those parts were intended to facilitate prosecution of felony narcotics cases so as “to remove more narcotics peddlers from our streets, deter professional drug traffickers and stem the flow of drugs into our communities.” Memorandum from Nelson A. Rockefeller, Governor, New York State (June 17, 1971), in 1971 N.Y. LAWS 2614. See also N.Y. JUD. CT. ACTS LAW §§ 177-a to 177-e (McKinney 1983 & 2003 Supp.) (establishing and governing Narcotics Parts); BELENKO & DUMANOVSKY, *supra* (noting that the Narcotics Parts were intended solely to reduce disposition time). As for the recidivism impact of New York’s drug courts, see REMPEL ET AL., *supra* note 46, at 274-81.

95. Judy H. Kluger, *The Impact of Problem Solving on the Lawyer’s Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1894 (2002). Kluger was a former presiding judge of the Midtown Community Court, and is currently responsible for overseeing the expansion of New York’s Integrated Domestic Violence Courts.

96. Compare Morris B. Hoffman, *The Denver Drug Court and Its Unintended Consequences*, in DRUG COURTS IN THEORY AND PRACTICE 67, 87 (James J. Nolan, Jr., ed. 2002) (judge who participated in the decision to open the Denver Drug Court describing its many failures), with N.Y. STATE COMM’N ON DRUGS & THE COURTS, *supra* note 18, at 105 (blue-ribbon commission recommending statewide expansion of New York’s drug court program). See also MICHAEL REMPEL ET AL., *supra* note 46, at 274-81 (finding, inter alia, that drug court participants had lower recidivism than comparable defendants not entering drug court); Steven Belenko, *What the Data Shows*, 29 FORDHAM URB. L.J. 1827, 1839 (2002) (noting that although the majority of drug courts achieved a reduction in recidivism, Denver is one of a few that did not).

the need for care in the planning and operation of these courts.⁹⁷ Attempting to stop the cycle of drug addiction and domestic violence as cases come before us not only is no perversion of our roles as lawyers and judges but indeed represents an effort to fulfill the highest values of our profession.

VI. CONCLUSION

I conclude with the observation that New York has made a significant commitment to problem-solving, but we are not alone in our enthusiasm for this new approach. In 2000, the Conference of Chief Justices and the Conference of State Court Administrators passed a joint resolution endorsing the concept of problem-solving courts. The resolution encouraged the broad integration of the principles and methods used in those courts into the administration of justice, in order “to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the needs and expectations of litigants, victims and community.”⁹⁸ The American Bar Association adopted a similar resolution the following year.⁹⁹

I think the next step is to take up the challenge presented by these resolutions, to explore incorporating the strategies and technologies we have tested in problem-solving courts into the broader administration of justice.

This means asking some hard questions. How do we make the current problem-solving courts better? Should we consider additional problem-solving parts, or should we—can we—systemize these efforts and encourage every courtroom to adopt the underlying principles? How do we help lawyers and judges think about more effective outcomes? How do we incorporate these principles into legal education?

These are just a few of the challenges that confront us in the days ahead. They are not insignificant, but given the current size and state of our dockets, as well as the tangible evidence of success with our innovations, I believe this approach is well worth pursuing.

I close by returning full circle to Chief Judge Cardozo. To be sure, the subject of this essay is a far cry from the novel common law issues that

97. For example, Professor Eric Lane reviewed three case studies—of the Stanford Drug Treatment Court, the Brownsberg Community Court, and the West Jackson Domestic Violence Court—to examine “whether problem-solving courts can be effectively maintained without damage to the individual protections afforded defendants under the due process mantle” of federal and state constitutions. Eric Lane, *Due Process and Problem-Solving Courts*, 30 *FORDHAM URB. L.J.* 955-57 (2003). He concluded that “with certain cautions, problem-solving judging and lawyering, as described by the case studies and other available material, need not be in conflict with due process standards.” *Id.* at 958.

98. Conference of Chief Justices, Resolution 22, & Conference of State Court Administrators, Resolution 4, In Support of Problem-Solving Courts (2000), available at http://www.communityjustice.org/ccj_cosca_resolution.html.

99. A.B.A. HOUSE OF DELEGATES REP. NO. 117, cited in *DAILY JOURNAL*, 2001 ANNUAL MEETING, A.B.A. HOUSE OF DELEGATES, Aug. 6-7, 2001, at 13, 25, <http://www.abanet.org/ftp/pub/leadership/2001journal.doc> (last visited Aug. 12, 2003).

captivated Chief Judge Cardozo. But the spirit that motivates us is much the same: using our best skills and best judgment, we try to fit the law to the new challenges an evolving society leaves at our courthouse doors—whether a newfangled Buick automobile with a defective wooden wheel,¹⁰⁰ or a recycling docket of drug-driven behavior. The process of testing and retesting new ideas, retaining and refining what is good and rejecting what is not, keeps the law relevant and responsive to a changing world. It is a great privilege for me, as Chief Judge, to be part of that process.

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I think the next step is to take up the challenge presented by these resolutions to explore incorporating the strategies and technologies we have found in problem-solving courts into the broader administration of justice. This means asking some hard questions: How do we make the current problem-solving courts better? Should we consider additional problem-solving courts? How should we—can we—systemize these efforts and encourage every court to adopt the underlying principles? How do we help lawyers and judges think about more effective outcomes? How do we incorporate these principles into legal education?

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⁹⁸ For example, Justice Eric Lipton reviewed three case studies—of the Stamford Drug Treatment Court, the Thompson Community Court, and the West Jackson Domestic Violence Court—to examine how problem-solving courts can be effectively maintained without damage to the traditional judicial system. Lipton, *Problem-Solving Courts: A Process Model of Federal and State Courts*, 19 *PROBLEM SOLVING COURTS* 11 (2007). He concluded that "the primary goal of problem-solving courts is to improve the quality of the justice system and to provide a more efficient, cost-effective, and user-friendly system for the public." Lipton, *Problem-Solving Courts: A Process Model of Federal and State Courts*, 19 *PROBLEM SOLVING COURTS* 11 (2007).

100. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916).

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THINK PIECE

Problem-Solving Courts

A Brief Primer

Written by

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John Feinblatt

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A Brief Primer

Introduction

The past decade has been a fertile one for court reform. All across the country, courts — in concert with both government and community partners — have been experimenting with new ways to deliver justice. This wave of innovation goes by many names and takes many forms. Domestic violence court in Massachusetts. Drug court in Florida. Mental health court in Washington. Community court in New York. Each of these specialized courts targets different kinds of concerns in different kinds of places. And yet they all share a basic organizing theme — a desire to make courts more problem-solving and to improve the kinds of results that courts achieve for victims, litigants, defendants and communities.

“Problem-solving courts” are still very much a work in progress. As yet, there is no clearly articulated definition or philosophy that unites all of those who espouse or practice problem-solving justice. Viewed in the aggregate, however, it is possible to identify several common elements that distinguish problem-solving courts from the way that cases are typically handled in today’s state courts. Problem-solving courts use their authority to forge new responses to chronic social, human and legal problems — including problems like family dysfunction, addiction, delinquency and domestic violence — that have proven resistant to conventional solutions. They seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the well-being of communities. And they attempt to fix broken systems, making courts (and their partners) more accountable and responsive to their primary customers — the citizens who use courts every day, either as victims, jurors, witnesses, litigants or defendants.

The proliferation of problem-solving courts raises some important questions. Why now? What forces have sparked judges and attorneys across the country to innovate? What results have problem-solving courts achieved? And what — if any — trade-offs have been made to accomplish these results?

This essay is an attempt to begin to answer these questions. It traces the history of problem-solving courts, outlines a basic set of problem-solving principles and poses a set of questions that are worthy of further study as problem-solving courts move from experiment to institutionalization.