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COMMUNITY COURTS AND COMMUNITY JUSTICE

FOREWORD

PROBLEM-SOLVING COURTS: FROM INNOVATION TO INSTITUTIONALIZATION

Michael C. Dorf and Jeffrey A. Fagan*

The phenomenal growth of drug courts and other forms of "problem-solving" courts has followed a pattern that is characteristic of many successful innovations: An individual or small group has or stumbles upon a new idea; the idea is put into practice and appears to work; a small number of other actors adopt the innovation and have similar experiences; if there is great demand for the innovation—for example, because it responds to a widely-perceived crisis or satisfies an institutional need and resolves tensions within organizations that adopt it—the innovation rapidly diffuses through the networks in which the early adopters interact. Eventually, what was originally an innovation becomes institutionalized.[1]

Three institutional imperatives gave rise to the diffusion of drug courts. First was the docket pressure created by intensification of the war on drugs in the

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* The authors are, respectively, Professor of Law and Professor of Law and Public Health at Columbia University. They thank Tim Casey for service above and beyond the call of duty in organizing this Symposium, the editors and staff of the American Criminal Law Review for their hard work and patience, and Zachary Tripp for excellent research assistance.

1. *See generally* GEORGE W. DOWNS, JR., BUREAUCRACY, INNOVATION AND PUBLIC POLICY (1976); GABRIEL TARDE, THE LAWS OF IMITATION (Elsie Clews Parson trans., 2d ed. 1903); Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395 (1990); Gregory Bovasso, *A Network Analysis of Social Contagion Processes in an Organizational Intervention*, 49 HUM. REL. 1419 (1996); Ronald S. Burt, *Social Contagion and Innovation: Cohesion Versus Structural Equivalence*, 92 AM. J. SOC. 1287 (1987) (comparing competing models to analyze purported evidence of social contagion in the diffusion of technological innovation); Lawrence Mohr, *Determinants of Innovation in Organizations*, 63 AM. POL. SCI. REV. 111 (1969).

Two analytical frameworks have dominated theory and research on innovation in organizations. The "determinate" model posits a relation between some set of social, economic or political variables and the adoption of innovation. In the "diffusion" model, innovations spread through interpersonal contact as ideas are passed and accepted through a social influence mechanism. These models need not be mutually exclusive, however. For syntheses, see EVERETT M. ROGERS, DIFFUSION OF INNOVATIONS (4th ed. 1995); Jack Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).

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1980s.[2] Second was the perception shared by the public and legal elites that the crush of drug cases led to a crisis in the courts,[3] characterized by an ineffective system of punishment and a "revolving door" that recycled offenders without reducing either their drug use or criminality.[4] Third was discomfort among some trial court judges with the restricted sentencing discretion in drug laws enacted during this same period,[5] creating incentives for experimentation with sentencing alternatives. At the same time, the popular demand for punitive responses to control what was perceived as a runaway epidemic of drugs and collateral social problems focused the courts on solutions that blended judicial control with therapeutic interventions.[6]

Drug courts provided a structure and philosophy that promised to resolve each of these tensions. Whereas the public at large tended to view drug-addicted criminals chiefly as a social menace, judges and other legal actors were more comfortable treating (nonviolent) offenses committed by drug addicts as a medical problem.[7] Indeed, because drug courts emphasized both the individual responsibility of drug addicts and the disease model of addiction, they enabled persons with widely divergent views about drug policy to find common ground.[8] They were, in short, an innovation well suited to the times.

After nearly a decade and a half of experimentation and diffusion, problem-solving courts are quickly reaching the institutionalization phase of their relatively brief natural history. The progenitor of modern drug courts first opened in Miami

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2. *See* Michael Z. Letwin, *Report from the Front Line: The Bennett Plan, Street-Level Drug Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 827 (1990) (discussing the effects stemming from the overflow of inmates tied to increased drug enforcement activities). For the response of state courts to the crisis, see N.Y. STATE COMM'N ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO CHIEF JUDGE JUDITH S. KAYE 10 (2000) (hereinafter KAYE REPORT), *available at* http://www.nycourts.gov/reports (last visited Nov. 19, 2003). *See generally* ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE (1993); MARK KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS (1992); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); FRANK ZIMRING & GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL (1992).

3. *See* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL'Y 125, 128 (2001), *available at* http://www.courtinnovation.org (last visited Nov. 24, 2003).

4. *See* KAYE REPORT, *supra* note 2; JAMES L. NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 108-10 (2001); John Feinblatt et al., *The Future of Problem-Solving Courts*, 15 CT. MGR. 28, 29 (1999).

5. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 82 (1998); Susan N. Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Reevaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777 (2000); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998); Lisa R. Nakdai, Note, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557 (2001).

6. *See* JAMES L. NOLAN, THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END 83-84 (1998).

7. *See* NOLAN, REINVENTING JUSTICE, *supra* note 4, at 133-8.

8. *See id.* at 51-7; *see also* Elaine M. Wolf, *Systemic Constraints on the Implementation of a Northeastern Drug Court*, *in* DRUG COURTS IN THEORY AND IN PRACTICE (James L. Nolan ed. 2002). Critics of drug courts have also noted the sympathy of judges towards the disease model of addiction. *See, e.g.*, Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1471-73 (2000) (arguing that the disease model ignores complex interactions shaping drug addiction).

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in 1989 and included Janet Reno among its key participants. As Attorney General through both of President Clinton's terms, Reno would provide seed money for drug courts nationwide.[9] The seeds took root. As of October 2003, there were 1,091 operating drug courts, with another 413 in the planning stage.[10] Many of the original drug court innovators have moved on to other endeavors, and a new generation of actors is quickly replacing them. Professionalization and standardization have grown as innovation has begun to give way to institutionalization.[11]

Accordingly, problem-solving courts are now at a critical turning point, presenting a fitting moment to pose a series of policy and practical questions reflecting the issues that have emerged since their inception. To that end, lawyers, judges and scholars specializing in law and social science gathered at Columbia Law School in April 2003 to reflect on the experience of problem-solving and community courts, and to ask what comes next. The essays and commentaries in this Symposium reflect the wide range of reactions that problem-solving courts have sparked, and the issues that the next generation of actors in problem-solving courts will face.

Candace McCoy explores the evolution and growth of drug courts. She draws a cautionary lesson from other efforts at judicial reform – particularly the juvenile courts that emerged at the turn of the twentieth century[12] and the movement from indeterminate to determinate sentencing that took hold in the 1980s.[13] Both phenomena are closely related to modern problem-solving courts. The juvenile courts were for a long time rationalized as therapeutic rather than retributivist interventions in the lives of young offenders, just as problem-solving courts have been rationalized as practicing therapeutic justice.[14] Both reforms sought to avoid

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9. *See* John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 948-50 (2000). Reno was also instrumental in forming the Drug Court Program Office, now incorporated into the Bureau of Justice Assistance. *Id.*

10. OJP DRUG COURT CLEARINGHOUSE, DRUG COURT ACTIVITY UPDATE: OCT. 15, 2003 (2003), *available at* http://www.american.edu/justice/publications/2003factsheet.pdf (last visited Nov. 23, 2003).

11. The existence of a professional association, the National Association of Drug Court Professionals (NADCP), reflects this institutionalization. *See* NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, 9TH ANNUAL ADULT DRUG COURT TRAINING CONFERENCE OFFICIAL PROGRAM, *available at* http://www.nadcp.org/events/conferenceprogram.pdf (last visited Nov. 24, 2003).

12. For a view of the juvenile courts as the first problem-solving courts, see David S. Tanenhaus, *The Historical Roots and Growth of American Juvenile Justice, 1850-1950, in* A CENTURY OF JUVENILE JUSTICE 42 (Margaret K. Rosenheim et al., eds. 2002). For an analysis of how juvenile courts increasingly came to resemble conventional courts in the wake of *In Re Gault*, 387 U.S. 1 (1967), see, e.g., Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988).

13. *See generally* STITH & CABRANES, *supra* note 5. The modern era of determinate sentencing began with changes in California, Washington, and Indiana. These states' sentencing practices are codified in the Uniform Determinate Sentencing Law. CAL. PENAL CODE §§ 1170, 3000, 3040 (2000); IND. CODE. §§ 35-50-2-1 to -10 (1998 & Supp. 2003); WASH. REV. CODE § 13.40.010(2) (1993 & Supp. 1996) (for juveniles). Many other states have since followed suit. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-701, -702 (2002); COLO. REV. STAT. § 18-1.3 (2002).

14. *See* Peggy Fulton Hora, William G. Schma, & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and*

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the potential harms of formal punishment. Moreover, both drug courts and juvenile courts shared an optimism about the promise of rehabilitation, drew service providers into the influence (if not control) of the court, and used the legal authority of the court to direct offenders to therapeutic interventions rather than punitive sentences.

The similarities between the evolution of determinate sentencing and the history of the drug court movement are even more direct: Sentencing guidelines that imposed stiff mandatory penalties (for drug offenses, among others) led to overcrowded prisons and dockets; this generated pressure to divert cases from the courts, which led in turn to the renewed political viability of measures, such as drug courts, that were not strictly punitive.[15] But just as the determinate sentencing movement, which began with bipartisan consensus, quickly became a vehicle for those who simply sought the harshest possible penalties,[16] so McCoy warns that the left-right alliance that gave rise to drug courts could easily fall prey to politics. With federal money for crime control programs drying up and states facing grim fiscal crises,[17] drug courts could become a hollow shell: starved of the resources to provide or monitor needed services, they would be unable to prove their worth. At the extreme, severely underfunded drug courts might end up doing more harm than good.

On the other hand, if drug courts do receive sufficient resources, McCoy's analysis suggests a different danger. She notes that many of the champions of drug courts view them as a means of circumventing what they regard as unduly harsh

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Crime in America, 74 NOTRE DAME L. REV. 439 (1999); David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691 (1999); Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 TOURO L. REV. 479, 480 (2002). *But see* Hoffman, *supra* note 8 (offering critique and view of the "pretext of treatment").

15. For example, New York State's Rockefeller drug laws impose a mandatory minimum sentence of 15 years for possession of four ounces of "substances containing a narcotic drug." N.Y. PENAL LAW §§ 70.00, 220.21 (1999). Most states have also adopted predicate felony laws imposing greater sentences for repeat felons. *See, e.g.*, CAL PEN CODE § 667.5 (2003); IND. CODE ANN. § 35-50-2-8 (2003). The consequences of these laws are well documented. *See generally* Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L. J. 1551 (2003) (showing that the growth in drug arrests coupled with the state's predicate felony laws (mandating prison sentences for repeat felony offenders) contributed to the rise in incarceration throughout the 1990s, even as crime declined sharply in the latter half of the decade); Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001); Alexander B. Smith & Harriet Pollack, *Curtailing the Sentencing Power of Trial Judges: The Unintended Consequences*, 36 COURT REVIEW 4 (1999). For discussion of the influence of mandatory minimum and predicate felony laws on the drug court movement, see NOLAN, REINVENTING JUSTICE, *supra* note 4, at 39-61; John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277 (2000).

16. *See* MARK MAUER & THE SENTENCING PROJECT, RACE TO INCARCERATE (1999); TONRY, *supra* note 2; FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT (1991).

17. *See* Fox Butterfield, *As Budgets Shrink, Cities See an Impact on Criminal Justice*, N.Y. TIMES, June 7, 2003, at A11; Lydia Polgreen, *Hard Times Get Harder Upstate as Fiscal Crisis Spans New York*, N.Y. TIMES, May 18, 2003, at A1.

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mandatory minimum sentences.[18] While we share McCoy's normative view of such sentences, we wonder how long drug courts can fly under the radar of the larger political debate. If the public demands harsh sentences, then a program that successfully circumvents popular demand for punishment seems politically vulnerable.

In her commentary on Professor McCoy's paper, Laurie Robinson takes issue with the analogy to the political movement for determinate sentencing. Robinson notes that the problem-solving court movement has been a "grass-roots" phenomenon, about which national politicians have had little to say. The question that neither McCoy nor Robinson can answer is what will happen when the political spotlight does fall on problem-solving courts. The enthusiastic embrace of drug courts by trial court judges and recent endorsements from appellate courts provide a dramatic backdrop to the possibility of an unfolding tension between the judiciary and the political branches over the future of this reform.[19]

Ultimately, the political future of drug courts and problem-solving courts more generally will depend upon their efficacy and cost-effectiveness as a response to crime. Efficacy and cost-effectiveness, of course, have long been the chief selling points of drug courts; yet, as both the defenders and critics of drug courts agree, most studies are inconclusive with respect to these criteria.[20] Although none of the principal papers in this symposium directly addresses the efficacy question, several of the participants – including supporters Steven Belenko and Michael Rempel as well as critics Morris Hoffman and James Nolan – refer to issues of efficacy.

Our own view is cautious: we agree with the critics that many of the studies often invoked by drug court supporters are flawed, inconclusive or both. The main lesson we draw with respect to efficacy questions is that more, and better, research needs to be undertaken. Well-designed assignment schemes and long-term longitu-

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18. The idea of drug courts as a counterweight to the increased severity of drug-related sentencing is a recurring narrative among drug court proponents, but as McCoy notes it is an "unspoken theme." *See* Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 41 AM. CRIM. L. REV. 1513, 1518 (2003).

19. New York Court of Appeals Chief Judge Judith Kaye has been instrumental in promoting drug courts in New York State. *See* Feinblatt et al., *supra* note 15, at 278-81. Some other appellate judges have raised doubts, however. An Oklahoma appellate judge even opined that his state's "Drug Court Act runs afoul of the separation of powers doctrine in that it makes the adjudicating judge a part of an executive, judicial, legislative triumvirate." Alexander v. State, 48 P.3d 110, 116 (Okla. Crim. App. 2002) (Lumpkin, J., concurring). Michigan Supreme Court Justice Stephen J. Markman agrees, citing the danger that problem-solving courts will encourage the exercise of non-judicial powers by the judiciary, in turn running afoul of the rule of law. *See* Stephen J. Markman, Drug Courts, Address to the Task Force on the Ethical Implications of Problem Solving Courts, Fetzer Institute (April 26, 2002) (transcript on file with American Criminal Law Review).

20. *See* STEVEN BELENKO, NAT'L CTR. ADDICTION AND SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 22 (2001). *But see, e.g.*, Denise C. Gottfredson et al., *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL'Y 171, 174-5 (2003) (reporting results of an experiment with random assignment of defendants eligible for drug court to either drug court or to the District Court where drug cases are not differentiated for special processing).

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dinal studies that enable direct measurement of recidivism would go a long way toward answering the key questions. Encouragingly, the round of clinical trials and other controlled studies recently completed by drug courts and their supporters suggests that those in the field take this challenge seriously, too.[21] The evidentiary bar is set high in these studies – which is to the good – and thus there are both large risks and large potential benefits for the "movement" in this development.

Beyond commissioning one-time studies, problem-solving courts could institutionalize a form of permanent self-study aimed at self-improvement. The information technology that permits drug courts to closely monitor defendants' performance in treatment should enable the courts to monitor their own performance. In the coming years, drug courts and those that study them should also be able to compare the performance of various treatment providers and modalities. Assuming that treatment is more efficacious than no treatment, under what circumstances does inpatient treatment outperform outpatient treatment? What is the ideal duration of treatment for a given type of addiction? To what extent can other drugs, such as methadone, play a part in treatment, and if they do, is permanent reliance on such drugs an acceptable outcome or just another form of addiction? How efficacious are treatment modalities that are expressly religious or quasi-religious (such as "twelve-step programs" that require submission to "a Higher Power"),[22] and how does their effectiveness compare to programs that rely on secular systemic or psychological-therapeutic methods? In answering questions such as these, problem-solving courts will face a challenge in trying to provide answers based on solid research rather than ideology.[23]

WHAT IS THE DOMAIN OF PROBLEM-SOLVING COURTS?

As problem-solving courts increasingly tackle problems besides drug addiction, efficacy questions become entangled with more directly normative concerns. No

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21. *See id.*; *see also* MICHAEL REMPEL ET AL., CTR. FOR CT. INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS, AND IMPACTS, *available at* http://courtinnovation.org (last visited January 16, 2004) (reporting evidence of significant recidivism reductions among drug court participants in multiple sites using several types of controlled studies to compare defendants in drug courts with similar defendants in regular court parts); Bruce G. Taylor et al., *The Effects of a Group Batterer Treatment Program: A Randomized Experiment in Brooklyn*, 18 JUST. Q. 171, 179 (2001) (reporting results of a randomized experiment on domestic violence cases).

22. *See, e.g.*, DICK B., THE GOOD BOOK AND THE BIG BOOK: A.A.'S ROOTS IN THE BIBLE (1997); NARCOTICS ANONYMOUS: WHO, WHAT, HOW, AND WHY (1976), *available at* http://www.na.org/ips/eng/IP1.htm (last visited Nov. 24, 2003); Alcoholics Anonymous, The 12 Steps of Alcoholics Anonymous, *available at* http://www.alcoholics-anonymous.org (last visited Nov. 24, 2003) (requiring acknowledgment of a "power greater than ourselves"). This stands in contrast to the secular therapeutic model used in residency programs such as Phoenix House, Odyssey House, and Day Top Village.

23. For criticism of drug court research methodology, see U.S. GENERAL ACCOUNTING OFFICE, DRUG COURTS: BETTER DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS (2002); U.S. GENERAL ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS (1997).

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commentators have yet suggested a heuristic to decide which types of social problems and crimes are amenable to, or appropriate for, problem-solving courts, and what conditions must exist for courts to take this step. There are now specialized courts for mentally ill offenders, drunk drivers, parole or probation violators, gun carriers, domestic violence offenders, and several other types of offenses and offenders.[24] Why these problems and not others?

Domestic violence courts, for example, were established before there was any known effective treatment for batterers.[25] Moreover, as a normative matter, the very idea of "treating" someone for the propensity to commit acts of domestic violence may appear to excuse such acts of violence.[26] There is likely to be enormous (and justified) political resistance to classifying such a propensity as a disease in the same way that drug courts accept the disease model of addiction – and that opposition would likely remain (and perhaps justifiably so) even if there were a scientific basis for the disease classification.

Even if one were willing to pathologize domestic violence as a form of mental illness,[27] the heterogeneity among offenders further complicates both the scientific basis for therapeutic intervention and the normative question. Some assailants undoubtedly do manifest mental health abnormalities or disorders that would justify treatment in lieu of punishment or coupled with punishment. But many other assailants do not have these symptoms, and certainly would not merit a reduction in punishment.[28] These tensions are not unique to domestic violence

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24. The long history of specialized courts includes family, juvenile, bankruptcy, and housing courts. *See generally* Wendy N. Davis, *Special Problems for Specialty Courts*, 89 A.B.A.J. 32 (2003) (discussing the development and particular issues facing specialty courts). The current trend is for even greater specialization. For example, there are now youth peer courts, teen courts, re-entry courts, wellness courts, and community courts. *See* MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT (2000); David C. Anderson, *Kids, Courts, and Communities*, Center for Court Innovation, *available at* http://www.courtinnovation.org/pdf/kid_courts_com.pdf; Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1 (2002); Goldkamp, *supra* note 9, at 924.

25. *See* COMM. ON THE ASSESSMENT OF FAMILY VIOLENCE INTERVENTIONS, NAT'L RESEARCH COUNCIL & INST. OF MED., VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS (Rosemary Chalk & Patricia A. King eds., 1998).

26. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 185-86 (2000). Advocates for victims of domestic violence do not so much worry that violence is implicitly excused by substituting treatment for punishment, as that a non-punitive sanction can increase victim risk of more and worse injury. *See* JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORTS (1996), *available at* http://www.ncjrs.org/pdffiles/crimdom.pdf (last visited Nov. 24, 2003).

27. *See* Donald G. Dutton et al., *Intimacy-Anger and Insecure Attachment as Precursors of Abuse in Intimate Relationships*, 24 J. APPLIED SOC. PSYCHOL.1367 (1994).

28. *See* Amy Holtzworth-Munroe & G.L. Stuart, *Typologies of Male Batterers: Three Subtypes and the Differences Among Them*, 116 PSYCHOL. BULL. 476 (1994). For empirical studies on the heterogeneity of personality types among men who assault intimate partners, see generally DONALD G. DUTTON, THE ABUSIVE PERSONALITY: VIOLENCE AND CONTROL IN INTIMATE RELATIONSHIPS (1998); NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN: NEW INSIGHTS INTO ENDING ABUSIVE RELATIONSHIPS (1998); Donald G. Dutton et al., *Client Personality Disorders Affecting Wife Assault Post-treatment Recidivism*, 12 VIOLENCE & VICTIMS 37 (1997); Zvi Eisikovits et al., *Cognitive Styles and Socialized Attitudes of Men who Batter: Where Should We Intervene?*, 40 FAM. REL. 72 (1991); W. Gleason et al., *Psychological and Social Dysfunctions in*

cases; the very idea of treatment for anyone who has violated the criminal law raises basic moral questions.[29] But the issue is heightened in the case of domestic violence, where there is an identifiable and vulnerable victim, so that the system's failure in any given case creates an issue of not just public safety but the safety of a particular person.

Accordingly, whether and where domestic violence courts fit in the problem-solving-court model is one of many questions about the model itself. To some extent, problem-solving courts are simply specialized courts that develop expertise with particular problems. In this account, drug courts, domestic violence courts, mental health courts, and the like are criminal cousins of civil forums such as bankruptcy courts, tax courts, and the United States Court of Appeals for the Federal Circuit (which has exclusive jurisdiction over patent appeals).[30] Beyond the obvious fact that the criminal problem-solving courts can threaten to, and in fact do, imprison people, what distinguishes them from other (civil) courts of specialized jurisdiction is their capacity to provide and/or monitor the provision of services that go beyond the particular jurisdictional hook that brings the parties into court in the first place. And, problem-solving courts create a web of reciprocal accountability between courts, defendants and treatment providers that transcends the traditional adversarial roles in both civil and criminal courts.

Is the ability to integrate services holistically the feature that unites the various kinds of courts under the problem-solving rubric? If so, we face a puzzle, for increased specialization – separate courts for drug addiction, housing disputes, mental health issues, domestic violence, and so forth – runs in the opposite direction of holistic jurisprudence. Indeed, "community courts" such as the Red Hook Community Justice Center in the Red Hook neighborhood of Brooklyn, New York, tout as one of their principal advantages their *lack of specialization*.[31] The fact that the same judge hears cases falling within several jurisdictional categories, it is claimed, enables him to devise solutions that do not solve one problem only by exacerbating another. For example, federally assisted housing authorities take a zero-tolerance approach to drug possession,[32] so that a conventional drug court judge might aid an addict in kicking the habit only at the cost of having him and his family evicted from their apartment; by contrast, a community court judge could,

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Battering Men: A Review, 2 AGGRESSION & VIOLENT BEHAV. 43 (1997); Edward W. Gondolf, *Characteristics of Court-Mandated Batterers in Four Cities: Diversity and Dichotomies*, 5 VIOLENCE AGAINST WOMEN 1277 (1999).

29. For a normative view on criminal accountability, see Stephen J. Morse, *The Twilight Of Welfare Criminology: A Reply To Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976). For a literary approach to substituting treatment for punishment, see ANTHONY BURGESS, A CLOCKWORK ORANGE (1962).

30. *See* Wendy N. Davis, *supra* note 24, at 34, 37.

31. *See* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & POL'Y 125, 128 (2001), *available at* http://www.courtinnovation.org (last visited Nov. 24, 2003); Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 83-92 (2002).

32. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002) (confirming ability of HUD to evict public housing tenants when a member of the household or a guest engaged in drug-related activity, regardless of whether the tenant knew or should have known about the activity).

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in principle, obtain the forbearance of the housing authorities for a resident receiving drug treatment so long as the resident remains under the judge's supervision.[33]

Of course, a community court judge can only act across subject matter jurisdictional boundaries if she has control over her docket. Accordingly, community courts are necessarily small courts. That is, as Jane Spinak noted in a comment during the Symposium, one of their key advantages. But size has its advantages too. Due to its expansive case load, the Brooklyn Treatment Court (for drug-addicted offenders) is able to feed a large number of clients to many different service providers. It thus has the capacity to learn what programs are most effective and use the performance of the best providers as a standard against which to measure the others. Community courts serving smaller populations across subject-matter jurisdictional boundaries may be able to piggy-back on the information obtained by such larger courts – especially if they are geographically proximate, as in the case of Red Hook and the Brooklyn Treatment Court – but they cannot themselves develop large databases as effectively as the larger courts.

By calling attention to the wide variety of problem-solving courts, we do not mean to imply that the problem-solving court model is so capacious as to be vacuous. Relative to conventional courts, nearly all problem-solving courts are characterized by a problem orientation and closer monitoring of what takes place outside the courtroom.[34] This, in turn, leads to a set of questions that are addressed in most of the principal papers in this Symposium. James Nolan asks whether the practice of therapeutic jurisprudence is consistent with the kind of independence and detachment traditionally thought essential for the judiciary to perform its distinctive function in a liberal democracy. William Simon asks whether defense attorneys can act consistently with their ethical duties when representing clients in drug courts and other problem-solving courts. And Victoria Malkin asks what role the community plays in defining the problems that problem-solving courts address and how the community is defined.

These are all urgent questions, and answering any of them completely requires an answer to the others. Simon, for example, confronts the complaint that problem-solving courts unacceptably place lawyers in the position of having to cooperate with the state. He notes that even in other settings the law frequently assigns defense attorneys duties to third parties and the court. He concludes that lawyers engaged in transactional work, rather than in litigation, may provide a better model for lawyering in problem-solving courts. Indeed, the "contracts" that many problem-solving courts require clients to sign call for just those lawyering skills in the defense attorney that one associates with the transactional attorney.

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33. *See, e.g.*, Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 942-43 (2003).

34. *See* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 849 (2000); Thompson, *supra* note 31, at 64, 66-67.

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Moreover, Simon argues, problem-solving courts do not even pose a fundamental challenge to the traditional conception of the courtroom attorney. He observes that the standard conception of the lawyer as zealous advocate obligates the lawyer to pursue any lawful means of advancing her client's interest, but that nothing in that conception requires that the law define the bounds of permissible advocacy in a way that invariably favors defendants. In other words, if problem-solving courts provide defense attorneys with fewer mechanisms with which to advance their clients' interest in avoiding penal sanction, that poses no ethical dilemma, so long as the attorney takes advantage of the opportunities the law provides to address offenders' therapeutic needs.

Simon's answer perhaps suffices to dispatch the concerns of individual attorneys practicing in problem-solving courts, but it points to systemic concerns as well. From the standpoint of institutional design, we want the law to provide defense attorneys with just those procedural rights that ensure a fair adjudicative process, nothing more and nothing less. Yet a therapeutic orientation, Nolan contends, deprives defendants and the system as a whole of a critical determinant of due process: a detached and neutral judge. When the state expressly advocates imprisonment as a means of retribution, incapacitation or deterrence, the judge understands that the interests of the state and of the defendant are antagonistic, and that the judicial function is to give each side a fair hearing. However, when the state proposes treatment backed by threat of punishment for the defendant's own good, the judge may lose sight of the fact that interests remain opposed. As a result, the judge may – and Nolan shows that he sometimes does – pressure clients into treatment, acting, in effect, as just another coercive arm of the state by adopting principles of "harm reduction."[35]

Although Nolan's criticisms suggest a fundamental incompatibility between justice and the consequentialism that underlies the drug court and problem-solving court approach, he does not, in the end, condemn drug courts and problem-solving courts outright. Rather, he intends his critique as an admonition to those who would institutionalize such courts to consider their impact on the traditional goals of the criminal justice system. That admonition can be taken in one of two ways. One might think, as we suspect Nolan himself does, that the costs to justice are too high and the returns to crime control and offenders are too low, and that the experiment with problem-solving courts ought to be abandoned. Alternatively, one might welcome problem-solving courts – or at least accept them as a fait accompli – and ask what measures can be taken to ensure that due process is appropriately reconceptualized and respected within such courts.

Due process is not the only area in which problem-solving courts could stand to improve. McCoy's paper shows that problem-solving courts arose from a movement of elites – principally judges. Yet if they are to be successful in the long term,

35. NOLAN, REINVENTING JUSTICE, *supra* note 4, at 194-6.

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and if they are to produce the normative legitimacy needed to leverage social control among their users, problem-solving courts must address the problems that affect the people whose communities they serve.[36] And Malkin's paper indicates that, while institutions like the Red Hook Community Justice Center want to address community needs, there remains a gap between community perceptions of the problems that need addressing and the perceptions of the court personnel. How to close that gap – how to mediate between the technocratic logic of a problem-solving court and the democratic logic of a community court – remains one of the main challenges for problem-solving and community courts.

The pages that follow contain a wide range of thoughtful approaches to the questions we have flagged and many others. These richly nuanced essays will, we hope, spark further debate over a phenomenon that – for good or ill – can no longer be dismissed as a sideshow to the real action in traditional courts.

36. *See* Fagan & Malkin, *supra* note 33, 948-51; Thompson, *supra* note 31, at 89-91.

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