

# “WHAT IS A TRADITIONAL JUDGE

*The Midtown Community Court and the Brooklyn Treatment Court are examples of the “problem-solving” courts springing up around the country.*



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THE CENTER FOR COURT INNOVATION

edited by Greg Berman

*An edited transcript of a discussion among judges, attorneys, policy makers, and scholars.*

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## Introduction

Over the past decade, hundreds of experimental courts have sprung up across the country in an effort to test new approaches to difficult problems like family dysfunction, addiction, and quality-of-life crime. These “problem-solving courts” include specialized drug courts, domestic violence courts, community courts, mental health courts, and others. While each of these initiatives targets a different problem, they all seek to use the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities.

In the process, problem-solving courts have generated healthy debate among both proponents and critics. Advocates of problem-solving courts hail improved case outcomes, including reductions in crime, increased sobriety for addicts, safer neighborhoods, fewer probation violations, and enhanced public confidence in justice. Skeptics question whether the new courts are engaged in practices—including

# ANYWAY?"

## Problem solving in the state courts



### Moderator

Eric Lane, Eric J. Schmertz Professor of Public Law and Public Service, Hofstra Law School

### Participants

Kathleen Blatz, Chief Justice, Supreme Court of Minnesota

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James Cayce, Presiding Judge, King County, Washington, District Court

Kathleen Clark, Professor, Washington University School of Law

Cait Clarke, Lecturer, Harvard University, Kennedy School of Government

Legrome Davis, Supervising Judge, Criminal Division, Court of Common Pleas, Philadelphia

John Goldkamp, Professor of Criminal Justice, Temple University

Judith S. Kaye, Chief Judge, New York State Court of Appeals

Judy Harris Kluger, Administrative Judge, New York City Criminal Court

Cindy Lederman, Administrative Judge, Juvenile Division, 11th Judicial Circuit, Florida

Candace McCoy, Professor, Rutgers University School of Criminal Justice

Truman Morrison, III, Judge, District of Columbia Superior Court

William Nelson, Joel and Anne Ehrenkranz Professor of Law, New York University Law School

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monitoring defendants in treatment, listening to community concerns, and forging collaborations with government and non-profit agencies to solve discrete problems—that are inconsistent with the traditional values of the judicial branch.

What are problem-solving courts? What forces have led to their creation? How do they depart from business as usual? And what impact do they have on the roles of judges and attorneys? In late 1999, a select group of judges, attorneys, policy makers, and scholars gathered to answer these and other questions. The panel was the first in a series of discussions about problem-solving courts sponsored by the Office of Justice Programs, U.S. Department of Justice, the Open Society Institute (Program in Law and Society), and the Center for Court Innovation. What follows is an edited transcript of the conversation, which took place over the course of six hours in a Washington D.C. conference room.

—Greg Berman

**Eric Lane:** Let's start at the beginning. What are the conditions that have created problem-solving courts? Why do they exist?

**Hon. Judith Kaye:** Unquestionably the first modern day reality that you have to look at is the numbers of cases in the state courts, which are huge. Then there is the nature of the cases—there are not only more of them, but they've changed. We've witnessed the breakdown of the family and of other traditional safety nets. So what we're seeing in the courts is many, many more substance abuse cases. We have a huge number of domestic violence cases. We have many, many more quality-of-life crimes. And it's not just the subject of the cases that's different. We get a lot of repeat business. We're recycling the same people through the system. And things get worse. We know from experience that a drug possession or an assault today could be something considerably worse tomorrow.

**Hon. Kathleen Blatz:** If we're going to look at the conditions that have brought problem-solving courts into being, I think I would start with the public. Clearly there has been an increasing fear of crime. Census data show that your chance of being a victim of crime is actually the same today as it was in 1973. This means that in 25 years we have not affected your chance of being a victim. We've greatly increased your chance of being arrested and prosecuted. We've filled our prisons. But your chance of being a victim has not changed. The public is shocked when they hear that. It really begs a lot of questions about what we're doing in the criminal justice system and whether it is working. And judges are very frustrated. They see these problems.

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."

**Hon. Legrome Davis:** I run the felony criminal courts in Philadel-

phia. In the course of one year, I had 5,000 felony defendants plead in front of me and get sentenced. I spent the next five years of my life watching them come back to court with an array of problems. The challenge in my mind is how to address that situation. Really what we're talking about are the things that probation was designed to do. But in a jurisdiction like Philadelphia, with a probation department that has 45,000 people under supervision, it's just not possible for them to bring services to bear in a concentrated, meaningful way.

**Hon. James Cayce:** The reason that the mental health court in Seattle got started is, unfortunately, the reason that a lot of court innovations have taken place. And that's because of a tragic incident. In our case, there was a high-profile murder committed by a mentally ill person who had previously been to court on a misdemeanor case. This tragedy was the immediate reason people in Seattle were interested in the mental health court, but there were other reasons as well. It was clear that the system had totally failed the mentally ill population.

**Hon. Truman Morrison:** It is terribly odd that America is looking to the judicial branch to solve these problems. It seems to me that in very large measure, this is happening because of the abject failure of the other branches of government.

**John Goldkamp:** As a student of change in the courts, I think there are some practical forces that have impelled change as well. One is the drug epidemic and the war against drugs in the 1980s, which had the effect of blowing up many criminal justice systems. The second is the widespread overcrowding in the nation's correctional facilities, which has also put a strain on the system and raised serious questions about what we're going to do about delivering justice. We can thank these two factors for forcing innovation in all sorts of areas.

**Michael Schrunk:** When I was first elected DA, I thought I knew best. I went out to the neighborhoods and I

just knew that murders, rapes, and armed robberies were the most important thing to residents. They handed me my lunch. They talked about quality-of-life crimes. I think that's what led me to push strongly for drug courts, for mental health courts, and for community courts—a desire to get out there and re-establish the rule of law in the community. You know, it's all well and good for us to read about the Microsoft trial or the O.J. Simpson trial or some other sensational trial, but that's a very, very small percentage of what goes on in the world of our constituents. I strongly believe we've got to work on public credibility, because a lot of citizens, quite frankly, don't think judges are relevant.

## New Roles

**Lane:** What's so new about what judges are doing in problem-solving courts?

**Hon. Cindy Lederman:** It seems to me that the public is now coming to the courts and asking for solutions to problems like crime, domestic violence, and substance abuse. If we as judges accept this challenge, we're no longer the referee or the spectator. We're a participant in the process. We're not just looking at the offense any more. We're looking more and more at the best interests, not just of the defendant, but of the defendant's family and the community as well. This is quite a leap. It's not traditional. And not every judge can or should do this. It can be a disaster to have the wrong judge sitting in a problem-solving court. It's much more difficult than sitting in a normal courtroom. You need to read more than the law. You need a lot more courage as well, because you will be subject to tremendous criticism from your colleagues. "Are you being impartial? Do you know too much so that you can no longer be impartial?" I can't tell you how many times I've heard that. Which leads me to one of my favorite quotes, which is "The judiciary is the only profession that exalts ignorance."

**Kaye:** I've never understood that. I've been an appellate judge for more

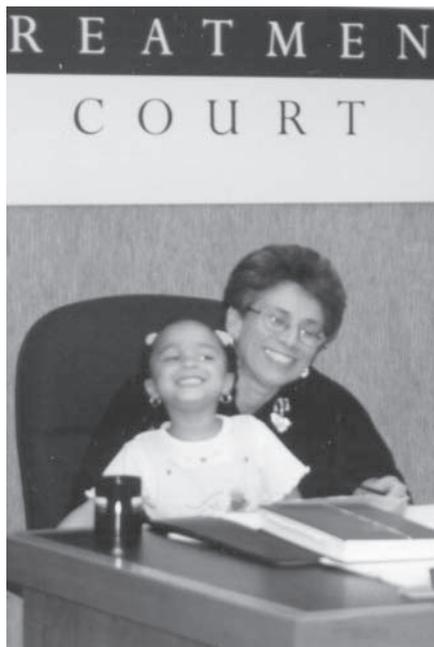
than 16 years. I've decided a lot of Uniform Commercial Code cases. I love the Uniform Commercial Code. I read a lot about it. Am I doing something unethical? Is the domestic violence judge who tries to make himself an informed person on the very difficult issue of domestic violence doing something unethical?

**Morrison:** I'm puzzled by some of the things that Judge Lederman said. I don't understand why it is that only a few of her colleagues would be fit to be in one of these special courts. I hope that it isn't because only a few of them share her ideological view of how you approach domestic violence or how you approach drug abuse, because if that's true, I think that's very, very worrisome.

**Schrunk:** I agree wholeheartedly that not every judge can be a problem-solving court judge. My public defender and I have to go out and recruit judges, literally, with the blessing of our presiding judge, to see if they'd be willing to do a drug court, to do a community court. We get turned down by some of my former deputies, some of my public defender's former deputies. What we're looking for is a proactive judge as opposed to a reactive judge, someone who can preserve the core values of the judiciary, but still be a risk-taker. I think there needs to be a recognition that this is non-traditional judging, just as I tell my young lawyers fresh out of law school who want to slug felons that this is non-traditional prosecuting. And I suspect deputy public defenders find out when they serve a tour in problem-solving courts that it's non-traditional defending, too. We're not preparing people in law schools for this.

**Kaye:** The suggestion is on the table that there is some sort of ideology that makes a good problem-solving judge. I thought it would be worthwhile hearing from one of the problem-solving judges.

**Lederman:** I think there's an ideology. There's a personality as well. There are many judges who are reluctant to speak human to human to the people that appear before them. Those judges are inappropriate for



*A child sits on the judge's lap at the Family Treatment Court in Manhattan.*

a problem-solving court. A judge has to feel that it's the responsibility of the judiciary to engage in this sort of work and have the personality to engage human beings from the bench. Not every judge has these characteristics.

**Morrison:** I still don't have a picture yet of who the ideal person for this job is. It strikes me that it ought to be a good judge—someone who is open to other people's ideas, who listens, who is informed, who is impartial. All of us have colleagues who are brilliant and colleagues who are boors. Obviously, we don't want bad judges in these courts. If we put aside the real bad people who probably shouldn't be on the bench anyway, most judges could do this job, many more than do.

By way of example, let me tell you about a colleague of mine on the bench. 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." I say this just to underline that if we're doing this right, it shouldn't be a tiny little fraternity and sorority of select jurists who are up to the task.

**Hon. Judy Harris Kluger:** I don't think you need a particular ideology. That would be terrible. I do believe that, except for our problem judges, most judges could do this job well. In my experience, once the Midtown Community Court got started in New York, judges said: "Could I sit there?" These judges were very different, but the common denominator was they were tired of having their competence evaluated on how many arraignments they could do. You know, for a long time my claim to fame was that I arraigned 200 cases in one session. That's ridiculous. When I was arraigning cases, I'd be handed the papers, say the sentence is going to be five days, ten days, whatever, never even looking at the defendant. At a community court, I'm able to look up from the papers and see the person standing in front of me. It takes two or three more minutes, but I think a judge is much more effective that way.

## Structure

**Morrison:** I'm concerned about the power that judges have and I'm concerned about giving judges the ability to make decisions that are just borne of their individual world view. I don't think we should free judges to leave their traditional role and be informed only by their own personal definition of what justice is. I spent my life as a lawyer walking into courtrooms with the law on my side and I would lose, and the reason I would lose was the jurist I appeared in front of thought he knew justice when he saw it. That kind of anarchy is what I don't want in courts. I don't think that has to in any way inhibit the creative role of problem-solving courts, but I think it's a risk that we need to pay attention to. We need to pay attention to the integrity of the court's

adjudicatory function. It may in fact be true that 99 percent of the cases that we're talking about here today are resolved through plea bargains. But it is essential to the integrity of the courts that we maintain the ability to serve the other one percent, however silly that may seem. We should never lose sight of the need to be faithful to the courts' ability to service the minorities. We run this institution in part to maintain the integrity of a process that isn't used very often to determine disputes in ways other than plea bargains.

**Blatz:** But you could set up a system to deal with the 99 percent of the cases much more effectively, which we have not done.

**Morrison:** I agree. Part of what I'm talking about is a function of architecture. I talked before about how I think it's surprising that we turn to courts to solve problems. 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.

**Lederman:** I still think we need to be vigilant about who we put in these courts. After 10 years of sitting on the bench, it seems to me that every day I have a tremendous ability to harm people. I think the ability to harm could be enhanced by the very nature of a problem-solving court.

**Lane:** Could you expand a little bit on the potential for causing damage?

**Lederman:** Well, one thing, I'm not sitting back and watching the parties and ruling. 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.

**Kaye:** As an administrator, I don't want the arrogant, anarchist judge in any court. I can tell you, though, how energizing a problem-solving court can be for judges. They are excited about this not because they are re-engineering the world, but because

they feel they are exercising a meaningful role as a judge.

**Blatz:** It seems to me that a bad judge can do less damage in a problem-solving court than they can do unfettered in the normal system. Once a problem-solving court is up and running, ownership and responsibility are shared. In a drug court, it isn't the judge by himself who's coming up with the rules about graduated sanctions or how to respond to violations—it's done in consultation with the defense and prosecution. Nobody wants a bad judge. But I think a mediocre judge can look a heck of a lot better in a problem-solving court where systems are in place than they can in a traditional court, where they can do absolutely anything.

### Tradition

**Richard Cappalli:** I'd like to bring some conventional thinking into this discussion. What I'd like to do is bring in the thinking of Chief Justice John Marshall as he described the judicial role in 1824.

**Kaye:** I'd like to take him to the criminal court of the City of New York.

**Cappalli:** I understand that. But there is some wisdom in old ways of thinking. So what I'd like to do is to bring a quotation into this discussion from *Osborne v. The Bank of the United States*. It goes like this: "Judicial power as contradistinguished from the powers of the laws has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law. When that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the law."

I think we have to talk about the ancient values of our legal system and how one goes about protecting not only defendants, but protecting judges from lawsuits and recusal motions. 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.

**Kluger:** I don't believe for one minute that these courts are operating outside the law. The statutes allow us to do what we're doing—to refer and monitor people in treatment, to utilize community service as a sanction. It may be a different world than Judge Marshall's world, but it's not outside of the law.

**Kaye:** I find myself a little hung up on nomenclature here. What is a traditional judge today, anyway? The other day I was meeting with John Feinblatt of the Center for Court Innovation and he drew three boxes on a sheet of paper. The number one box is John Marshall and the traditional view of the role of courts. The number two box is what's going on in reality today—the plea bargains, the mill court, McJustice. We're not functioning in the number one box any more in the state courts, except in 1 percent of the cases. For the most part, in the overwhelming numbers, the traditional judge today is in box number two, pleading cases at arraignment. Then we have box number three, which is the problem-solving box. Now, if you compare the number one box to the number three box you might well have the concerns of Justice Marshall. But try comparing the number two box to the number three box. It's quite a different picture, isn't it, professor?

**Cappalli:** I think John Marshall would say that hopefully in that second box, even though mass justice is being applied, all judges are committed to applying the law, and that every decision that the judge makes is

guided by New York State statutes that are sufficiently clear to tell him what to do and sentencing guidelines that are sufficiently clear to tell him how to act.

**Ellen Schall:** I would say that this notion of the traditional model as an ideal is actually dangerous, because it misses the point that it wasn't working. The reason we got into problem-solving courts is because it wasn't working for a judge to sit there and process, to do McJustice. That's not a thing you would ask a trained person to participate in. It's not a good use of anyone's time. I think we have to begin from the notion that the system from which the problem-solving courts have emerged was a failure on any count.

It wasn't a legal success. It wasn't a social success. It wasn't working.

### The role of attorneys

**Lane:** Professor Cappalli has summoned the ghost of John Marshall so it seems only appropriate to turn to Professor Nelson. As a legal historian, do you have any comments to add?

**William Nelson:** There have always been institutions possessed of the coercive power of government that have performed the kinds of functions we see today in problem-solving courts. For example, the justices of the peace throughout the 18th, 19th, and early 20th century were remarkably like the judges we're hearing about today, with one difference. The

structures that were there to help these justices engage in improving behavior were family structures, community structures, and not professional psychiatrists, social workers, and the like. But that seems to me to be not a comment on the judiciary, but a comment on the changing structure of American society.

There's one other major difference. In the 1940s, 50s, and 60s, we introduced lawyers into the petty courts, which seems to me to profoundly change what they do. I think there were reasons why as a society we did this. There were reasons why we cared about due process. There were reasons why we thought it was important to introduce John Marshall's idea of the rule of law to the more marginal people of society. There were obviously some enormously high costs to be paid for introducing lawyers into this process, because what the introduction of lawyers into this process did was to destroy what had been an ongoing system in which courts were problem solvers. So it's a trade-off, and I think we need to keep these trade-offs in mind as we decide whether we're doing the right thing with these problem-solving courts.

**Michael Smith:** One of the things that judges and courts are particularly good at, when they're not just milling people, is fact finding. But a fact-finding court is heavily reliant on advocates if it's any good. The presentation of evidence—and the judge's ability to make findings of fact about the plausibility of various potential interventions—is something that seems to be missing with problem-solving courts. I think one of the advantages courts have is the opportunity to test assertions. If we don't figure out a way to take advantage of that, then we're not going to have very good problem-solving courts. The courts will be no better than the social service clinics, which have failed to address these



**Offenders sentenced by the Midtown Community Court to clean up graffiti.**

problems. So the adversary system and the presence of defense counsel are of enormous value in problem solving.

**Lane:** Are we witnessing some failures of zealous advocacy in these courts? There's lots of talk that the team approach at drug courts undermines counsel's ability to effectively advocate for their clients. Is getting along a threat to the core values of courts or attorneys?

**Schrunk:** Well, concerns about zealous prosecution can be defeated by results. Good, hard-core evaluation can help explain why dismissing 1,500 drug cases during the course of a year at the drug court is a better end product than 1,500 convictions in a regular court. As for zealous defense, I've not seen defense counsel roll over. I learned long ago that I've got to have defense counsel at the table to keep me from overreaching.

**Blatz:** I think what you need at problem-solving courts are attorneys, on both sides, who are willing to say, "Judge, our normal procedure is not going to work in this case," and then have the judge make an independent decision.

**Schrunk:** Exactly. That's why you need defense counsel and you need the prosecutor there. But it's only going to be a small percentage of cases where attorneys need to stand up and holler.

**Blatz:** I think the only difference in terms of the zealousness of advocacy in a problem-solving court is that you might get obsequiousness out of familiarity with the judge and the team approach. I know attorneys can sometimes get too close to the judge or to the court and then they feel like they can't make challenges. That's a risk. But in a non-problem-solving court you can get obsequiousness out of fear. When I was a trial judge, I saw attorneys intimidated before I had even opened my mouth. It's the same problem.

### Ex parte communication

**Cait Clarke:** I want to talk about an experience I had with my criminal justice class recently when we went

to visit 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 resolutions. My students turned to me and asked: where's the defense lawyer? They weren't in the room.

**Kluger:** It shouldn't happen. It was a mistake, I would imagine, and there should never be a discussion about a case and a defendant without the prosecutor and the defense counsel being present.

**Lane:** So Judge Kluger's point is that this is bad practice but not necessarily a byproduct of the problem-solving court, that ex parte communication is a risk in every courtroom.

**Blatz:** I think the chances of ex parte communication increase greatly in a problem-solving court, but to the degree that people engage in these practices, I think it's totally inappropriate under any model.

**Clarke:** I just want to clarify, because I don't think the drug court judge thought he was having an ex parte experience, and I'll tell you why. The judge felt that because the defendant had already pled guilty that the court was no longer in the adjudicatory mode. He felt that they were in the therapeutic stage. I think he thought that they were simply caring for a client.

**Kluger:** I do agree there is an ex parte risk with problem-solving courts, but I don't think it's the traditional risk of the judge and prosecutor talking without the defense attorney. The risk is that the judge will talk with clinical staff without either of the parties present.

**Morrison:** 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.

**Smith:** My view is that if judges who are sitting in these roles don't make sure that they've got defense counsel and prosecutors who are prepared to say, "Judge, that's bull," when some treatment professional comes in and says this is the right thing to do, then

the judge is really without the special advantages that courts offer when trying to make solutions to problems in individual cases. If you don't have that, then why the hell do we have the court?

**Candace McCoy:** I think we probably have a consensus here about the inappropriateness of ex parte communication. My concern with these courts is broader. The issue that concerns me is the coerciveness of the trial penalty itself. Now, we can't solve that one today, I think that's pretty clear. But I think we could start with the physician's ethical admonition, "First, do no harm." It's pretty bad right now in terms of the coerciveness of the guilty plea system, so you don't want to make it worse under a problem-solving court system.

**Kathleen Clark:** Lawyers don't have that obligation, at least not explicitly. And in fact, many lawyers see as an integral part of their job the obligation to do harm to others in order to help their client. So while I'm not sure whether the "do no harm" notion applies to courts, it clearly doesn't apply to lawyers.

But I want to come back to this ex parte question, because I think there is another issue worth exploring, and it relates to what Judge Morrison was saying earlier about ideology. Problem-solving judges are expected, I think, to become knowledgeable about a social problem and about the received wisdom concerning the most appropriate ways to address that problem. In the process, they are engaging in conversations, not necessarily about a particular case, but about classes of cases. Now, that's not prohibited by the Code, but judges are rightly sensitive about it. And the more the caseload is specialized, the more there's a tension between this received wisdom—which some people might identify as ideology—and the notion of impartiality that's expressed through ex parte prohibitions.

**Blatz:** This notion that Professor Clark brings up, that knowledge is bias, I have a hard time with. Ignorant people can be biased and they can have an agenda, as can knowl-

edgeable people. So I have never understood why we need to make sure judges are ignorant. That is the old model and I just don't buy it.

### Going to scale

**Lane:** Let's look at the institutional issues raised by these courts. How do we begin to integrate problem-solving courts into the fabric of a state court system?

**Schall:** I guess I would say three things. The first is that before you go to scale, you want to be thoughtful about what you take to scale. You don't want to just take everything that exists and multiply it. The second point is to ask what is the role of problem-solving courts in system change outside of the courtroom, in the mental health system and the domestic violence system? I don't see much point in fixing the family court in any given jurisdiction if you don't also increase the capacity of the child welfare system to be effective. The third point for me is what are the implications for the rest of the judicial system? If drug courts are very busy trying to connect individuals with their families, then why in the rest of the criminal court do we incarcerate women for 10 days for some petty offense and have them lose their children to the foster care system and then have to work for years to get them back? Why, if we've learned something in some part of the court, why can't we move it into the rest of the court?

**Smith:** It seems to me that there are two different ways to go to scale. One is to use problem-solving courts as laboratories, importing what we've learned about practice to the rest of the court system to improve the way it does business. The other is to build a new system devoted to proliferating problem-solving courts. That choice may turn out to be a critical one.

**Schall:** I want to push back on going to scale. I think Michael asked an important question. He suggested one way of going to scale is to take what we know and influence the rest of the courts, which may mean that problem-solving courts would continue to exist or they may not. Or go-

ing to scale could mean every court system in this country should have some percentage of its business conducted in problem-oriented courts. I don't think it's clear what we mean by "going to scale."

**Schrunk:** I look at going to scale this way—I think a lot of jurisdictions are going to reach critical mass on problems, whether it's drugs, whether it's mental health, whether it's quality-of-life crime, and they're going to take a step back and say, "Can't we do things better?" There's a big risk, particularly for the judiciary, in taking this step, and I think the risk is failure. I think the challenge is taking the step and still holding onto our core values. I think one of the vital components in doing so are the prosecution and defense, because I think those two advocates are not going to let a judge run roughshod and sell a program that just doesn't work.

**Cappalli:** Cut me off if I slow down the march toward scale. I came into this relatively ignorant of problem-solving courts, and I thought that might be a good idea, to bring in somebody who can take some fresh looks at these things. I see a number of very serious problems. One of them is coercion. It strikes me that you've got a terrible problem of coercion and consent in problem-solving courts. The second thing I worry about is the absence of structure. It seems to me that the "good judge" might be the judge who feels comfortable bending the rules to get to what that judge feels is the correct result. Well, as a professor of civil procedure, it worries me because we've spent hundreds of years devising procedures to ensure that things are done fairly.

One final problem is paternalism. It strikes me that these courts are highly paternalistic. What they're going to do is to reform individuals, with some suspect consent on their part, by putting their superior expertise to work deciding who this individual is, what this individual's problems are, and what set of services can best help this individual re-integrate himself or herself into the commu-

nity. That is an extraordinarily paternalistic system. Now, that isn't necessarily bad. But it is something that deserves discussion.

**Kaye:** I'm not sure what choice we have. You read the papers, you know what's coming into our courts. The political branches are choosing to put more and more cases into the courts. The state courts are the gatehouses of the law. The federal courts are the manor houses of the law. We are dealing with the population that we have and we are simply trying to do the best job that we can. The truth is, we're trying to improve the system, and maybe disaggregating a little bit is a good way to do it. The system is so massive, we can't declare it a failure and walk away from it. Nobody's doing that.

**Goldkamp:** This reminds me of a discussion that I participated in in the early 90s. I was invited to a meeting of judges and I watched them hold a debate about drug courts. Some said: "I don't know if we should be doing this kind of thing; it's just not what judges are supposed to do." And others said: "Excuse me, where do you live?" It was very, very informative. That was a good while ago. So I find today's discussion anachronistic. I think what we have now is not a bunch of little hobbies that judges have in isolated jurisdictions, but rather a paradigm shift that larger court systems are trying to come to grips with. They're at your door step. The question isn't: Gosh, are courts supposed to be doing this? It's: What are you going to do about it? How does it fit in? It's no longer a question of whether this should have been invented. They're here. ☞