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## Due Process and Problem Solving Courts

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# DUE PROCESS AND PROBLEM-SOLVING COURTS

Eric Lane\*

## INTRODUCTION

The rapid proliferation of “problem-solving courts,” particularly of drug courts, occasions this Article. These progeny of the 1989 Dade County, Florida drug court<sup>1</sup> can be found throughout the country. According to one report, there are approximately 500 drug courts operating nationwide, with several hundred more coming on line.<sup>2</sup> From these drug courts, a number of other courts have evolved, all under the problem-solving handle. In New York, for example, in addition to drug courts, there are community courts and domestic violence courts.<sup>3</sup> In the State of Washington there is a mental health court.<sup>4</sup> While disparate in their focus, their “problem solving” characterization appears to result from a shared, urgent common goal of judicially addressing problems deemed, usually by the court, as not adequately addressed through the quotidian mills of, at least, the overloaded urban criminal justice system. Chief Justice Kathleen A. Blatz of the Supreme Court of the State of Minnesota has forged a palpable description of this problem-solving stimulus:

I think the innovation that we’re seeing now is the 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

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1. For a general discussion of the rise of problem-solving courts, see GREG BERMAN & JOHN FEINBLATT, *CTR. FOR COURT INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER* (2000). For the edited transcripts of two discussions on problem-solving courts, sponsored by the Department of Justice and the Center for Court Innovation, see Colloquium, *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 *JUDICATURE* 78 (2000) [hereinafter *Problem Solving in the State Courts*]; Colloquium, *What Does it Take to be a Good Lawyer? Prosecutors, Defenders and Problem-Solving Courts*, 84 *JUDICATURE* 206 (2001) [hereinafter *Prosecutors, Defenders and Problem-Solving Courts*]. The Author moderated the first discussion and observed the second.

2. BERMAN & FEINBLATT, *supra* note 1, at 4.

3. *Id.* at 3.

4. *Id.*

like I work for McJustice: we sure aren't good for you, but we are fast."<sup>5</sup>

This emergence of problem-solving courts as an alternative to "McJustice" has begun to engender debate over the three foundational premises on which problem-solving courts rest: first, courts are appropriate institutions for solving the undertaken problems; second, the resources commanded for this problem-solving do not shortchange the resolution of more important but more complex problems; and third, the problem-solving protocols employed by these courts are effective.<sup>6</sup>

While the outcome of this debate is of enormous importance to the continued existence of problem-solving courts, there is another important question. That question is whether problem-solving courts can be effectively maintained without damage to the individual protections afforded defendants under the due process mantle of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and under similar provisions found in state constitutions.

This question arises primarily in a theoretical and speculative context because little empirical work has been done on the subject. There have been few reported cases challenging problem-solving courts' jurisdiction or procedure, and there is no consistent picture of the procedures necessary for the operation of a problem-solving court generally or for a particular type. The question is engendered by the sense expressed by both advocates and critics that problem-solving courts require a different role for judges, and perhaps lawyers, than that required by traditional courts. This difference is sharply expressed in the following remarks of Judge Cindy Lederman, the first judge in the Dade County drug court, and Professor Richard Cappalli, at the December 3, 1999 forum on problem-solving courts:

Hon. Cindy Lederman: 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

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5. *Problem Solving in the State Courts*, *supra* note 1, at 80; *see id.* at 82 (quoting Chief Judge Judith Kaye of the New York Court of Appeals, "[Judges] 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."). *See generally* BERMAN & FEINBLATT, *supra* note 1.

6. John Feinblatt et al., *Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts*, 15 CT. MANAGER 28, 28 (2001).

the defendant, but of the defendant's family and the community as well.<sup>7</sup>

Cappalli: 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. . . . If we take the mantle of the law's protections off of the judges and put them into these new roles, we have to worry about judicial neutrality, independence, and impartiality.<sup>8</sup>

The broad question then for this Article is whether Judge Lederman's proactive problem-solving judge can judge in a manner consistent with the protection of a defendant's due process rights, or whether there is something in this problem-solving rendering of a judge's function that must undermine those protections.

As noted earlier, there is little evidence on which to form a full, realistic picture of the practices of problem-solving courts. Hence, the analysis and conclusions will be hypothetical. The "facts" for this Article include: first, three case studies, The Stanford Drug Treatment Court ("Drug Court"), The Brownsberg Community Court ("Community Court"), and The West Jackson Domestic Violence Court ("Domestic Violence Court"), each containing several illustrations of typical issues that each court addresses, prepared by the Center for Court Innovation<sup>9</sup> as the "factual" basis for two discussion groups convened by the United States Department of Justice to discuss problem-solving courts; second, the edited, published transcripts of these discussions;<sup>10</sup> and third, the occasional literature on problem-solving courts. As for the case studies, they were not intended to provide a full picture of what was happening in each of the courts from which they were drawn.<sup>11</sup> The goal of each was to highlight and invite discussion on some aspect of each court's procedure, which the Center judged might be con-

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7. *Problem Solving in the State Courts*, *supra* note 1, at 80.

8. *Id.* at 82.

9. The Center for Court Innovation is an independent research and development entity of the New York Court System and was responsible for the planning and implementation of numerous problem-solving courts. The case studies were prepared by the Center's staff in consultation with a number of problem-solving court participants. A number of staff members and outside readers also reviewed the studies. The Author served as one of those readers.

10. *Problem Solving in the State Courts*, *supra* note 1; *Prosecutors, Defenders and Problem-Solving Courts*, *supra* note 1.

11. See CTR. FOR COURT INNOVATION, CASE STUDY: STANFORD DRUG TREATMENT COURT 1 n.1 (1999) [hereinafter DRUG COURT]. The Case Study is reprinted in Appendix 1 with permission from the Center for Court Innovation.

sidered unique or of concern.<sup>12</sup> Their goal was to provoke a critical exploration “before they enter the mainstream” of whether “problem-solving courts [are] any less protective of individual rights than the typical state court?”<sup>13</sup>

After reviewing this material, this Article takes the view 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. The cautions relate to the level of judicial activism pictured in each of the case studies, particularly the ones describing the community court and the domestic violence court. If such level of engagement needs to be maintained for the continuation of these courts, it could raise serious questions about judicial independence and impartiality. Of particular concern is the community advisory board, which seems intended to establish a judicial bias. Also problematic is the requirement that domestic violence defendants attend batterer’s programs. Arguably, this is punishment that cannot be constitutionally justified.

### I. AN EXCURSUS FOR COMPARISON

As noted earlier, the spark that charges this due process inquiry results, at least in part, from the rub between Judge Lederman’s and Professor Cappalli’s competing judicial portraits. Such a comparison casts an unfavorable shadow on problem-solving courts because of the inherent suggestion that, whatever they are, they are lesser judicial institutions than are traditional courts. This, of course, could negatively influence any study of the due process afforded by problem-solving courts. But such a comparison misses the mark. Problem-solving courts should not be measured against the standards of the “traditional” courts, but against the backdrop of Judge Blatz’s McJustice courts.

The Sisyphusian goal of these traditional courts is to clear the chronically over-clogged calendars of urban criminal courts by trading lighter sentences for guilty pleas in a vast number of cases. And these calendars have continued to grow.

[T]he caseload increase in the state courts has been staggering. Take domestic violence, for example. From 1984 to 1997, the number of domestic violence cases in state courts increased by 77 percent. Or look at drugs: national research reveals that as

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12. *Id.*

13. See Feinblatt et al., *supra* note 6, at 28.

many as three out of every four defendants in major cities test positive for drugs at the time of arrest. The story is no different for quality-of-life crime. In New York City, for example, over the past decade the number of misdemeanor cases has increased by 85 percent.<sup>14</sup>

Chief Judge Judith Kaye of the New York State Court of Appeals describes the judicial role in New York's urban criminal courts as "pleading cases at arraignment,"<sup>15</sup> a portrait confirmed by Judge Legrome Davis who described how, in one year, he "had 5,000 felony defendants plead in front of me and get sentenced."<sup>16</sup>

The image is of a revolving door in which a large percentage of offenders continuously spend a part of their time offending and part of their time in jail, apparently waiting to offend again. As Chief Judge Kaye has noted, "[W]e'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."<sup>17</sup>

The goal of the problem-solving courts is to provide an alternative to this revolving door, assembly line approach to "justice."<sup>18</sup> In the case of the drug court, the defendant is offered a treatment program instead of incarceration.<sup>19</sup> The goal is to rid the offender of her addiction.<sup>20</sup> In the case of the community court, the defendant is punished for low-level crimes that usually fly below the criminal justice radar screen. The punishment is usually some form of community service. The goal is to restore a sense of order to the community, and secondarily, through selected social programs, to restore a sense of order to the offender. In the case of domestic violence courts, the defendant is constantly monitored prior to the case's disposition. The goal of this monitoring is to provide safe harbor to the victim and make an offender accountable for her conduct.

In each case, the defendant can refuse the alternative treatment. A defendant in a drug court can refuse the treatment, thus subjecting herself to the McJustice system. Similarly, a community court defendant can choose to be processed by the regular system. Finally, a domestic violence court defendant can refuse the monitor-

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14. *Id.* at 29.

15. *Problem Solving in the State Courts*, *supra* note 1, at 82.

16. *Id.* at 80.

17. *Id.*

18. See BERMAN & FEINBLATT, *supra* note 1, at 6.

19. *Id.* at 4.

20. *See id.* at 3.

ing program, which most likely will subject him to pre-trial detention or high bail. This is not to deny the pitfalls of such a step, including long pre-trial incarceration, but only to state that what is thought of as the “traditional court” remains available to defendants.

The questions then become whether any of the procedures employed by the problem-solving courts are unique (*vis-à-vis* the McJustice courts), and, if so, what due process concerns such procedures implicate. Finally, if such procedures raise serious due process concerns, whether they constitute bad practices, subject to remedy, or whether they are an essential element for maintenance of problem-solving courts.

## II. DUE PROCESS IN THE PROBLEM-SOLVING COURTS

The following Sections discuss the due process issues raised by problem-solving courts, as presented by the case studies. For the most part, these issues are procedural, raising the question of whether a particular procedure undermines the state’s obligation to guard against an erroneous deprivation of defendant’s liberty.<sup>21</sup> The Domestic Violence Court Case Study also raises a substantive due process question, namely whether the required predisposition attendance at a batterer’s program is in fact punishment.<sup>22</sup>

The questions arise from two, perhaps unique, characteristics of problem-solving courts, at least as described in the case studies. The first is the reliance that problem-solving courts, at least the drug and community courts, apparently place on collaborative approaches to the problems they were created to address. In the Drug Court Case Study the term used is the “teamwork” approach.<sup>23</sup> Such an approach raises questions concerning the role of the defense lawyer in the required plea bargaining and in subsequent proceedings. It also raises questions concerning the impartiality and independence of the judge in the acceptance of any such

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21. See *People v. David W.*, 95 N.Y.2d 130, 136 (2000) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). As should be noted from these cases, this Article applies the reigning instrumentalist approach to due process. In other words, the question is whether on balance and contextually the procedures requested reduce the possibility of an erroneous deprivation, and not whether or not the procedures are fair.

22. “So-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ or interferes with rights ‘implicit in the concept of ordered liberty.’” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (citations omitted).

23. The subject will be discussed *infra* Part III.

plea and the imposition of sentence. What is the impact of the collaborative approach on a defendant's right to effective counsel,<sup>24</sup> or on a defendant's right to have an impartial judge weighing the voluntariness and intelligence of the plea?<sup>25</sup>

The second characteristic is the active judicial role that all problem-solving courts envision for their judges.<sup>26</sup> Judge Cindy Lederman, a founder of the groundbreaking Dade County Florida drug court, has emphasized (and perhaps overemphasized) this role: "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."<sup>27</sup>

In the case studies, this activism translates into different forms of judicial conduct. In the drug court study, the question is whether the judge can be impartial; in the community court study, the question is whether the judge can be independent; and in the domestic violence study, the question is how far the judge can go to protect the complainant. The case studies contain common issues. For example, the concern surrounding the right to effective assistance of counsel raised in the drug court also could be raised in the community court. Unless the analysis would lead to a different conclusion, these issues are not discussed in any detail more than once.

### III. THE DRUG COURT

#### A. Description

An explosion of drug-related crimes and high recidivism rates pushed Stanford's Judge Frank Smith to reexamine his judicial role. "If addiction was driving the majority of his caseload, shouldn't the court be doing something about it?"<sup>28</sup> The result of this reexamination was the establishment of a drug treatment court. The Stanford model drug court uses a "teamwork" approach; the team consists of the judge, the prosecutor, defense counsel, court social workers, and off-site treatment providers.<sup>29</sup>

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24. See *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.")

25. See *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (holding that the standard for the validity of plea bargains is a voluntary and intelligent choice among defendant's alternatives).

26. See BERMAN & FEINBLATT, *supra* note 1, at 8-9.

27. *Problem Solving in the State Courts*, *supra* note 1, at 82.

28. DRUG COURT, *supra* note 11, at 2.

29. *Id.* at 3.



Prosecutors are the gatekeepers to the drug court, using eligibility guidelines that basically reduce drug-related charges to nonviolent charges.<sup>30</sup> Once a defendant is routed to a drug court, she is initially assessed by a court-retained social worker, who makes treatment recommendations.<sup>31</sup> The information gathered by the social worker is then subject to a waiver “allowing for a limited disclosure of information.”<sup>32</sup> Counsel does not participate in defendant’s decision to sign the waiver.<sup>33</sup> The treatment providers chosen by the court employ both in- and out-patient treatment methodologies, which can last for several years.<sup>34</sup> Considerable information passes between the program administrators and the courts concerning court-sentenced patients.<sup>35</sup> A determination of eligibility is translated to a plea offer in which the defendant is offered drug treatment in return for a guilty plea to some specified offense.<sup>36</sup> The plea is conditioned upon a “backup” sentence in the event that the treatment is not successfully completed, or a dismissal of the charge if the treatment is successfully completed.<sup>37</sup> The plea is reduced to an agreement that contains the sanctions for noncompliance, which include, as a last resort, sentencing for the pled-to crime and several interim sanctions that “run the gamut from writing essays to sitting in the courtroom all day to spending a week in jail.”<sup>38</sup>

### **B. A Teamwork Approach to Plea and Sanction<sup>39</sup>**

The defendant, Rogers, has been charged with distributing cocaine and faces a maximum of twenty-five years if he is convicted of the top count in the indictment. Defense Counsel Simkins informs Rogers of a treatment diversion offer made by the prosecutor. Under its terms, Rogers would plead guilty to a lesser felony count, and enter an eighteen-month in-patient drug treatment program. If Rogers successfully completes the program the charges against him would be dismissed. If he fails to complete the pro-

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30. *Id.*

31. *Id.* at 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. The following scenario was taken from CASE STUDY: STANFORD DRUG TREATMENT COURT. See App. 1.

gram, he would serve thirty-six months incarceration. As part of the discussion of the plea, the following exchange occurs:

*Rogers:* Look, I know they found twelve rocks in my shoe when they searched me. But I thought you said you could try to get the case thrown out.

*Simkins:* Well, nothing is certain, but you do have a pretty good Fourth Amendment issue. If the judge agrees that the police didn't have the right to stop you. . . . But . . . you would be taking a real risk by going forward on a motion to suppress. If the judge didn't throw out the evidence, you'd be back where you are now, except the amount of time you'd be facing would probably be more. . . . Right now, even though under the statute you can get up to ten years in jail for possession with intent to distribute cocaine, the government has agreed that your "back up" time would only be 36 months. . . . That's if you take the deal today. . . . Let me be clear: you can always ask for treatment in this court, but the longer you wait, the more time you would likely face if you don't follow through with your program.

. . .  
*Rogers:* Can they do that? Try and force me to get treatment? . . .

*Rogers:* Well, what do you think I should do? . . . You're my lawyer.

*Simkins:* The ultimate decision has to be yours Mr. Rogers. . . . I think you have a really good suppression issue—not a slam-dunk, but good. Aside from the legal questions, though, you should ask yourself what you think is best for you. Even if we got this charge dismissed, where would you be? You told me you thought you needed to clean up. Here you have been given the chance to get off the street for a while. I'm not saying it would be easy—you'd have to come back to court every two weeks, do drug tests all the time, and lose your freedom for a while. It's a good deal, though, if you can make it through.

*Rogers:* So, if I test dirty, then I've gotta do the time?

*Simkins:* No, you won't fail out with a few dirties; but you will face sanctions. . . .

*Rogers:* Man, I don't know what to do. . . . A year and a half in a program is a long time, especially if I still might wind up doing time anyway. But, I do want to start cleaning up. . . .

*Simkins:* Well, think about it. Your case won't be called for about another fifteen minutes or so.<sup>40</sup>

Rogers then agrees to the plea. There is no reference to the Judge's conduct in accepting the plea. The decision to take a plea,

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40. *Id.* at 5-6.

even in return for a lesser sentence or a treatment alternative, is a grave decision in our criminal justice system, the “most important single decision in any criminal case.”<sup>41</sup> As the Supreme Court has written:

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment [or to lesser charges]. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.<sup>42</sup>

In the plea bargaining process, the role of the defense counsel is to make an independent examination of the facts, circumstances, pleadings, and laws involved, and then to offer his informed opinion as to what plea should be entered.<sup>43</sup>

Simkins’ eagerness for Rogers to accept the treatment model borders on the aggressive, raising the ethical question of whether the lawyer is making the plea decision for the client.<sup>44</sup> But, in and of itself, this exchange between lawyer and client raises no due process questions unique to drug courts. Any lawyer may push a defendant, even too hard, in a particular direction. A defendant can later challenge that effort as ineffective assistance of counsel,

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41. 1 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (1988).

42. *Brady v. United States*, 397 U.S. 742, 748 (1970) (citations omitted).

43. *See Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948); *see also* MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1992) (stating that a defense lawyer in a criminal case has the duty to advise her client fully on whether a particular plea to a charge appears to be desirable); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 841-49 (1998) (arguing that defense counsel must provide an informed opinion, but that this standard is loosely enforced by the courts); discussion *infra* notes 71-73 and accompanying text.

44. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1998) (requiring a lawyer to abide by client’s plea decision after consultation); *see also* N.Y. CODE OF PROF’L RESPONSIBILITY Canon 7 (noting the absence of any prohibition on lawyers seeking treatment for a client as part of plea bargaining, but further noting that nothing should compel defendant to plead guilty).

claiming that the defense counsel did not simply offer an opinion, but rather coerced the defendant into accepting it.<sup>45</sup> Success in such challenges is unlikely. As one court has written, “[a]dvice—even strong urging by counsel—does not invalidate a guilty plea.”<sup>46</sup> And well it should not, if the McJustice system, which depends upon pleas, is to continue. A lesser standard would lead toward the chaotic. As the Supreme Court has described:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense. Counsel’s performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.<sup>47</sup>

What is of concern here, though, is not the pressure commonly applied by a defense counsel to secure a plea that, hopefully, she thinks is appropriate, but the avowed “teamwork” overlay on that pressure. This raises the more fundamental question of the defense counsel’s independence.

In the representation of a defendant, “counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.”<sup>48</sup> If such a teamwork approach, in fact, requires a defense counsel to push a defendant towards treatment, regardless of facts underlying the charges, such a standard cannot be satisfied. The term “in fact” is used to recognize that under the reigning effective counsel doctrine, the primary question is whether there has been “actual ineffective assistance of counsel.”<sup>49</sup> In other words, even assuming an

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45. A defendant’s chances of succeeding in such a claim are very limited. The courts have given lawyers wide latitude. See *United States v. Rodriguez*, 929 F.2d 747, 753 (1st Cir. 1991) (holding that allegations of ineffective counsel were not sustainable solely because of the defendant’s claim of coercion to decline plea offer); see also *Zeidman*, *supra* note 43, at 869-70 (discussing the courts’ treatment of the defendant’s claim of ineffective counsel because of coercion).

46. *Williams v. Chrans*, 945 F.2d 926, 933 (7th Cir. 1991) (quoting *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir. 1976)).

47. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

48. *Id.* at 688.

49. *Id.* at 684. The test in *Strickland* is twofold: first, the defendant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Id.* The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of

actual oath of fealty to the teams and its goal of drug treatment, it would seem that, under *Strickland*, the defendant would have to establish that the defense counsel obeyed such an oath, or otherwise acted as an agent of the team in that particular case.

Of course, it is doubtful that such team allegiances and efforts are so sharply cast. Few within the criminal justice system would abide by such palpably violative conduct. More likely, the team approach signifies a common understanding of how to resolve certain types of cases, once the defense counsel fulfills her role of exploring the merits of the charge and its defenses. Such a common understanding no doubt forms part of the underpinnings of the everyday workings of the present criminal justice system. In a setting in which the defense counsel (legal aid, appointed counsel, counsel from law school clinics), the prosecutor, and the judge are all "regulars," in that they work together daily in the same courtroom, they develop shared goals, attitudes, and rules of conduct that allow the system to work and the participants to work together. While this "shared" approach raises some troubling questions concerning the role of counsel and judge, it does not itself raise unique problems for the problem-solving courts.<sup>50</sup> From this perspective, it is easy to understand Judge Kluger's conclusion in *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, that "if we are going to have to apply that kind of pressure, isn't it better that the pressure is in a life-changing direction . . . ?"<sup>51</sup> Judge Kluger's comment invites exploration of the role of the drug court judge. That role is to accept a plea, impose a sanction, and then monitor the sanction.<sup>52</sup> Does a judge's perception that the treatment alternative may be "life-changing" undermine the judicial obligation to assure that a plea "represents a voluntary and intelligent choice among the alternative courses of action open to

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professionally competent assistance. *Id.* In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Id.* At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. Second, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. *Id.* at 692.

50. For an early study of the bureaucratic allegiances of defense counsel, see Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 *LAW & SOC'Y REV.* 15 (1967).

51. *Problem Solving in the State Courts*, *supra* note 1, at 210.

52. See *DRUG COURT*, *supra* note 11, at 4.

the defendant?"<sup>53</sup> To determine the voluntary and intelligent choice, states require that a plea can only be accepted "after the trial court fully and fairly apprised [the defendant] of its consequences and ascertained by appropriate questioning that he had in fact committed the crimes to which he was pleading and that the plea was freely and voluntarily made."<sup>54</sup>

Can Judge Smith assure that this standard is fulfilled? He has led the effort to create the hypothetical Stanford Drug Treatment Court, for which:

The goal . . . would be not only to adjudicate the facts of the case, but also to address the problem that brought the defendant to court in the first place: namely, addiction. The idea was straight-forward—the court should actively try to solve the underlying problem of addiction. . . . It would use its coercive power to achieve the concrete goal of moving defendants from addiction to sobriety.<sup>55</sup>

Does this commitment to treatment for addiction result in deafness to the possibility that the addicted defendant did not commit the charged crime? The answer must be that it is possible in a given case that the court might rush to treatment, but that the commitment to a treatment alternative for addicted defendants does not disqualify judges from accepting pleas in drug courts.

### C. The Judge as Monitor: Ex Parte Communications

The acceptance of the plea and imposition of the sentence does not end the court's role in the defendant's life. Central to the alternative drug treatment model is the role of the judge in monitoring the progress of each defendant through "extensive communication between the court and the community-based programs; the court informs the treatment programs of each defendant's compliance conditions, and the programs keep the court informed as to defendants' progress."<sup>56</sup>

Illustrations Two and Three provide examples of extensive court involvement. In Illustration Two, the defendant, Laura McManna, is before Judge Smith on an update appearance.<sup>57</sup> She has been clean for three months after an early relapse resulted in the court-

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53. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

54. *People v. Burgos*, 451 N.Y.S.2d 888, 890-91 (App. Div. 1982).

55. See *DRUG COURT*, *supra* note 11, at 2.

56. *Id.* at 4.

57. *Id.* at 6.

room observation sanction.<sup>58</sup> Attorney Simkins announces that McManna is in the process of preparing for her GED exam.<sup>59</sup> Judge Smith then proceeds to present McManna with a reward, a leather-bound journal for keeping track of her progress.<sup>60</sup>

Simkins next steps forward to request that McManna be permitted to complete her treatment at an out-patient program.<sup>61</sup> Judge Smith is hesitant to grant the relief and informs Simkins that he will discuss the matter with the court's clinical director during the lunch break.

Closing down the court for lunch recess, Judge Smith stops by the office of the drug court's clinical director. . . . Mr. Brown supervises the court's social workers, and he is recognized to be the court's authority on the various community-based treatment programs used by the court. In speaking to Mr. Brown, Judge Smith learns that 90% of those defendants who are able to successfully complete the first phase of the court's treatment component—remaining clean for four months—have either successfully graduated from the program or are still active in treatment after two years. . . . With regard to Ms. McManna, Mr. Brown believes it would be best for her to remain in the in-patient program, at least until she makes it past the four month threshold.<sup>62</sup>

Following lunch, Judge Smith announces "Ms. McManna, I have given your request a good deal of thought and have spoken with our clinical director, who is an expert on drug addiction. At this time I think you should continue at Pine Hills [the in-patient center]."<sup>63</sup>

Illustration Three provides a somewhat different scenario. In this case, Frank Granada is alleged to have absconded from his in-patient treatment program, been found sleeping on a bus, and has tested positive for cocaine.<sup>64</sup> This is Mr. Granada's second absence from the program, and according to his agreement, he will receive a sanction of between fifteen and twenty-eight days in jail.<sup>65</sup> A third absence would result in his termination from the program.<sup>66</sup> When given a chance to speak, Granada tells the courts "I left New

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58. *Id.* at 6-7.

59. *Id.* at 7.

60. *Id.*

61. *Id.*

62. *Id.* at 7-8.

63. *Id.* at 8.

64. *Id.*

65. *Id.*

66. *Id.*

Horizons but I was going to go back. I only left to visit my aunt. She's real sick. And, I didn't use cocaine. . . . I took one of my aunt's painkillers for this back injury I have. . . . I swear it."<sup>67</sup> To which the Judge Smith replies: "I simply don't believe you"<sup>68</sup> and sentences him to fifteen days. During this proceeding Mr. Simkins attempts to speak on behalf of Mr. Granada but is cut off by Judge Smith.<sup>69</sup> "Counsel, I am talking to Mr. Granada. I want to hear what he has to say for himself."<sup>70</sup>

Two possible problems arise from these exchanges. The first is the communication between Judge Smith and Brown. They speak both generally about drug rehabilitation, and specifically about McManna's case.<sup>71</sup> On the basis of this conversation, Judge Smith rejects McManna's request.<sup>72</sup> Does this ex parte exchange between Judge Smith and Brown regarding McManna's case violate any due process tenet? The answer is no for two reasons. First, in order for McManna to even complain of the communication, she must have a constitutionally protected interest that might be restricted by the exchange. Does McManna have a constitutional right to out-patient treatment when her sentence was in-patient treatment? *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*<sup>73</sup> would seem to answer this question in the negative, at least under the Constitution. In *Greenholtz*, the Court made clear that a convicted party had no constitutional right to release before the expiration of a valid sentence.<sup>74</sup> State courts have announced similar rulings.<sup>75</sup>

Even if a constitutional right existed, it is doubtful that the ex parte communication between Judge Smith and Mr. Brown, at the post-disposition time, would violate due process. Under the doctrine announced in *Williams v. New York*,<sup>76</sup> a sentencing court is entitled to a broad range of information that would be:

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67. *Id.* at 9.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. 442 U.S. 1 (1979).

74. *Id.* at 16.

75. See, e.g., *United States v. Edwards*, 430 A.2d 1321, 1340 n.44 (D.C. 1981) (stating that "unquestionably, there is no right to post-conviction bail."); *Gilmore v. Kansas Parole Bd.*, 756 P.2d 410, 415 (Kan. 1988) (holding that the state's parole statute did not create a liberty interest in parole).

76. *Williams v. New York*, 337 U.S. 241, 250 (1949).



[U]navailable if information was restricted to that given in an open court by witnesses subject to cross-examination. . . . The type and extent of this information make totally impractical if not impossible, such open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues.<sup>77</sup>

Again, state courts have adopted similar reasoning.<sup>78</sup> While McManna, of course, is not actually being sentenced in this instance, effectively her request for a reduced sentence is part of the ongoing sentencing process and governed by the same rules.

Illustration Three, on the other hand, may present a different and more problematic situation. Assuming that the incarceration is a loss of liberty, the court is obliged to balance the individual interest, the state's interest, and the value of any advocated procedures for avoiding an erroneous deprivation.<sup>79</sup> On that basis, should Granada be able to contradict the positive cocaine test and establish the truth of the excuse for his absence? For example, should he be able to call witnesses? If the question is whether Granada was absent from the treatment center for whatever reason, and whether such an absence can trigger an incarceration under the terms of the sentencing agreement, then no serious due process question arises, unless Granada were to contest his absence. If, on the other hand, the incarceration is dependent upon determining the truth of Granada's excuses, the process due will depend mostly on how severe a loss of freedom the incarceration is judged to be. If the loss is analogized to a prison discipline restriction, such as solitary confinement or the loss of good time, less than full adversarial rights are required. The Supreme Court has found that due process is satisfied when the prisoner is afforded the following: adequate notice of the claimed violation; the written statements of evidence that are relied on; and an opportunity to call witnesses and present evidence in defense, as long as such efforts would not unduly jeopardize prison safety.<sup>80</sup> If, on the other hand, the loss is analogized to parole and probation violations, more procedural rights attach. For example, the Supreme Court has held that, in such cases, procedural protection includes the opportunity "to be heard in person and to present witnesses and documentary evi-

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77. *Id.* at 250.

78. *See, e.g.*, *People v. Peace*, 219 N.E.2d 419, 421 (N.Y. 1966); *Buchea v. Sullivan*, 497 P.2d 1169, 1174 (Or. 1972).

79. *See Mathews v. Elderdige*, 424 U.S. 319, 335 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

80. *See Wolff v. McDonnell*, 418 U.S. 539, 571 (1974).

dence [and] the right to confront and cross-examine adverse witnesses.”<sup>81</sup> There would also likely be the right to counsel, although the Supreme Court has determined that the need should be assessed on a case-by-case basis.<sup>82</sup> Here, even if your view of Granada’s liberty interest is that it is tantamount to that of a prisoner subject to discipline, Judge Smith acted too summarily in response to Granada’s defense. Assuming again that the defense could have an impact on the fact or time of incarceration, Mr. Granada should have had the opportunity to offer proof that, for example, the drug he had taken was a pain killer.

#### IV. THE COMMUNITY COURT

##### A. Description

The Brownsberg Community Court was established to address low-level criminal activity, such as “prostitution, drug dealing, public drinking and vandalism” that was beginning to overrun the downtown section of the community.<sup>83</sup> In effect, the central court system had basically ignored these crimes, sentencing almost all of those who pled guilty (seventy-five percent at arraignment) to time served, the time locked up waiting for arraignment.<sup>84</sup> There was no real distinction between those found guilty and those whose cases were dismissed. This led to a downward spiral in police attention to such cases.<sup>85</sup> Why should they bother if the courts were simply going to release offenders without punishment? Additionally, such a system did nothing to address the problems underlying the commission of such crimes.<sup>86</sup>

The community court is actually a misdemeanor arraignment facility where police bring defendants charged with the above-described crimes instead of the normal centralized arraignment court.<sup>87</sup> At the court, an attempt is made to create a profile of the defendant, including information on the defendant’s employment status, criminal record, drug use, health, and housing situation.<sup>88</sup> This information is added to the court’s computer database, which

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81. *Morrissey*, 408 U.S. at 489.

82. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

83. *See* CTR. FOR COURT INNOVATION, CASE STUDY: BROWNSBERG COMMUNITY COURT 1 (1999) [hereinafter *COMMUNITY COURT*]. The Case Study is reprinted in Appendix 2 with permission from the Center for Court Innovation.

84. *Id.* at 2.

85. *Id.*

86. *Id.*

87. *Id.* at 4.

88. *Id.*

allows the judge to have a readily available profile of the defendant at the time of arraignment.<sup>89</sup> Based on the alleged crime and the background material, a plea offer is extended to the defendant at arraignment.<sup>90</sup> If the plea is rejected, defendants are returned to the central court for further proceedings.<sup>91</sup> If the plea is accepted, the sentence is immediately imposed.<sup>92</sup> The sentence is almost never time served.<sup>93</sup> “Almost all defendants are required to perform community service in order to pay back the neighborhood they have harmed. These projects, supervised by a community service coordinator employed by the court, include graffiti removal, improvement of park gardens, or office assistance for local non-profit organizations.”<sup>94</sup> As part of their sentences, many defendants must also participate in treatment programs (for example, drug treatment), which are offered at the court facility. These programs remain available on a voluntary basis after the sentence has been served.

The court maintains a continuous dialogue with the public defenders, prosecutors, social service staff, and the community over new sentencing options and the effectiveness of the existing sentences.<sup>95</sup> Additionally “every month Judge Green convenes a panel of community members and police officers to hear about concerns and changes in the community.”<sup>96</sup>

### **B. The Community Advisory Board**

Illustrations One and Two highlight the unique role the community court judge plays in formally soliciting and considering community viewpoints. These illustrations also establish a context in which to evaluate the proceedings that occur in Illustrations Three and Four. In Illustration One, Judge Green is in her chambers meeting with her community advisory board, a group of people representing various segments of the neighborhood.<sup>97</sup> Also present are law enforcement representatives and court personnel.<sup>98</sup>

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 5.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

The head of a block association informs the court of growing concern about prostitution, which is disrupting the neighborhood.<sup>99</sup>

The corner of Park and Main has been awful lately—nothing but prostitutes, ‘johns,’ and noise. The same cars—filled with guys looking to buy sex—drive around and around all night long. They shout and honk their car horns until the early hours of the morning. I can’t get any sleep. Everyone in our building is sick and tired of it.<sup>100</sup>

At one point in the conversation, a local parent suggests that the sentence for “johns” should be a car honking in their neighborhood until the early morning.<sup>101</sup> This comment fosters in Judge Green the thought of confronting defendant “johns” with the community impact of their crimes, which will be discussed below.<sup>102</sup> Concurrently, law enforcement representatives inform the group that they have received a number of similar complaints, and are planning an undercover sweep on that particular corner.<sup>103</sup> As the meeting ends, a number of business owners inform the judge that their stores have been the target of a graffiti spree.<sup>104</sup> Judge Green tells them that she will consider using a community service team to remove the spray paint.<sup>105</sup> To the business owners this response seems eminently sensible.<sup>106</sup> “That would be terrific. Let the group who made the mess clean it up for a change.”<sup>107</sup>

Illustration Two opens a window on a meeting of Judge Green and her community court staff, which include the court’s mediation expert, its community service coordinator, and the court’s clinical psychologist.<sup>108</sup> They are discussing the community meeting which all attended.<sup>109</sup> The community service coordinator agrees to send a clean up crew to the graffiti-hit business area.<sup>110</sup> They then turn to a conversation about the prostitution problem.<sup>111</sup> The psychologist reports on research supporting facilitated meetings between of-

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99. *Id.*

100. *Id.*

101. *Id.* at 6.

102. *See infra* Part IV.C.

103. COMMUNITY COURT, *supra* note 83, at 6.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 7.

109. *Id.*

110. *Id.*

111. *Id.*

fenders and victims.<sup>112</sup> “[I]t helps offenders to realize that their acts have harmed the community, and it allows the community to play a role in the criminal justice process.”<sup>113</sup> The import of this observation later impacts the sentence Judge Green imposes on a “john.”<sup>114</sup>

Both of these illustrations present a picture of a proactive judge, set to use her coercive powers to remedy immediate “community” problems learned about through her community communications system.

Such judicial proactivity has raised questions of judicial impartiality. At the first of the Justice Department discussions, Judge Lederman described criticism she apparently experienced as a problem-solving judge:

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 have heard that. Which leads me to one of my favorite quotes, which is “The judiciary is the only profession that exalts ignorance.”<sup>115</sup>

Too much knowledge, itself, is probably not the basis of the criticism noted by Judge Lederman. No one really expects or wants a lawyer, upon becoming a judge, to self-exile herself to a judicial monastery. Even describing the concern as over-impartiality, at least in the most narrow due process sense, seems too narrow. There the question would be whether the presiding judge can impartially review the defendant’s guilty plea or whether she can preside impartially over any post-conviction “monitoring” hearings. In other words, the judge does not participate in the processes through which a defendant’s guilt is determined.

What is unsettling about these Illustrations, specifically Illustration One, is the film of Judge Green presiding over an apparently formal and regular meeting of both law enforcement officials and community representatives, assembled to discuss “community” problems and community-suggested remedies. The broad question raised by this scene is whether the community court has moved from a more central posting on the balance between political institutions (the legislature, the executive) and the individual toward a

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112. *Id.*

113. *Id.*

114. *Id.*

115. *Problem Solving in the State Courts*, *supra* note 1, at 80.

more political role as policy formulator and enforcer.<sup>116</sup> If so, the move raises a challenge to the traditional notion of the court as an independent institution, having “neither force or will, but merely judgment.”<sup>117</sup>

Looking more specifically at the described meeting, the presence of law enforcement officials reporting to Judge Green on the types of complaints they have been receiving casts Judge Green almost as a magistrate in the European inquisitorial model, ready to serve the state. Such a setting may violate Canon 4(C) of the 1990 American Bar Association Model Code of Judicial Conduct,<sup>118</sup> which prohibits judges from consulting with an “executive . . . official except on matter’s concerning the law. . . .”<sup>119</sup> Aside from the canon, the broad due process concerns are evident, given judicial responsibility for protecting the rights of defendants from the overreaching of law enforcement and in providing impartial judgments.

The presence of community representatives also could challenge Judge Green’s judicial independence, or the public sense of such independence, by creating an expectation in the community representatives that the judge would act on their suggestions. Even worse, such a meeting might engender a sense of obligation to act on these suggestions or worse, a commitment to a jointly established agenda. Even the appearance of such an obligation would run counter to Canon 1, which declares that “an independent and honorable judiciary is indispensable to justice in our society,”<sup>120</sup> as well as Canon 2(B), that prohibits judges from conveying or permitting others to convey “the impression that they are in a special position to influence the judge would be in conflict.”<sup>121</sup>

Placing this concern in a larger context, such formal meetings tend to impose legislative values upon the judicial function. For example, the community leaders who attend these meetings are no doubt influential in other aspects of community life, including the processes through which judges are either appointed or elected. It would be hyper-sanguine to think that disappointment over a

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116. For a discussion of this point, see Carl Baar & Freda Solomon, *The Role of Courts: The Two Faces of Justice*, 15 CT. MANAGER 19, 19-27 (2000).

117. THE FEDERALIST NO. 78 (Alexander Hamilton).

118. The 1990 American Bar Association Model Code of Judicial Conduct is the successor to 1972 ABA Code. The Code is not binding on judges unless adopted by their states. All but two states (Montana and Wisconsin), the District of Columbia, and the United States Judicial Conference have adopted codes modeled on either the 1990 or 1972 Model Code.

119. MODEL CODE OF JUD. CONDUCT 549 (1990).

120. *Id.* at 547.

121. *Id.*

judge's failure to act on a community leader's views expressed in a formal setting would not translate into the judicial selection process.

Does the above emphasis on judicial independence require judicial isolation from civic engagement? The answer to this question must be no. As one state's highest court has written, incorporating a commentary to the Model Code: "We agree emphatically that complete separation of a judge from extrajudicial activities is neither possible nor wise; he should not become isolated from the society in which he lives."<sup>122</sup> Not only is it impossible to isolate the court from opinion-shaping influences, but also it would be dangerous to do so. The public's understanding of the role of the court system is extremely important to the system's ongoing legitimacy.<sup>123</sup> "In the absence of non-judicial activities that reflect the tenor of a judge's ideas, the public and the bar will have no way of knowing of the jurist's proclivities. A ban on non-judicial activities will not erase biases, it will simply hide them."<sup>124</sup> Judges also benefit from civic activity. Judging requires that judges "live, breathe, think and partake of opinions in that world."<sup>125</sup> But such activity cannot be limitless. The question is where to draw the line. The answer of necessity is general and somewhat circuitous. "This line should not be drawn to eliminate all perceivable evils and temptations. Rather, the delineation should give the members of the judiciary every reasonable degree of latitude, barring activities only where they do measurable damage to the court's . . . appearance of impartiality."<sup>126</sup> To which should be added "independence" or "appearance of independence." Of course, this exploration of judicial civic engagement does not directly provide an alternative to Judge Green's community advisory board, with its emphasis on very particular problems within the court's remedial power. And it is not certain that such an alternative is possible, as it seems that the goal of this advisory board is to provide a "community" bias in

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122. *In re Bonin*, 378 N.E.2d 669, 683 (Mass. 1978) (quoting CODE OF JUDICIAL CONDUCT Canon 5(A) cmt. (1972)).

123. See Kevin M. Esterling, *Public Outreach: The Cornerstone of Judicial Independence*, 82 JUDICATURE 112, 112-13 (1998) (explaining how maintaining public confidence through community involvement is vital for allowing courts to act as independent decision-makers).

124. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 313-14 (3d ed. 2000).

125. Robert McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 12 (1970).

126. SHAMAN ET AL., *supra* note 124, at 315.

judicial decision-making. Otherwise what purpose does the board serve?

### C. The Plea Offer, Counsel's Advice, the Plea's Acceptance

Illustrations Three and Four include pleas of guilt and the imposition of particular community court-type sentences.<sup>127</sup> Both include offenses discussed in the meeting described in the earlier illustrations. In Illustration Three, George Rojas is charged with defacing public property by spraying the phrase "Y2K" on the side of a delivery truck.<sup>128</sup> At arraignment, after spending a night in jail, the prosecutor offers the defendant a plea to disorderly conduct and a sanction of time served.<sup>129</sup> The court disagrees with the offered plea and a new plea is offered.<sup>130</sup>

*Judge Green:* Do you want to take a moment to re-think your offer, counselor? I don't see how time served does anything to repay the community.

*Assistant District Attorney Wright:* Judge, on second thought, we'd like to offer a plea to disorderly conduct and recommend a sentence of eight hours of community service, which I think will send a strong message to Mr. Rojas about the impact of his behavior.<sup>131</sup>

The plea is then accepted by the defendant after Judge Green "engages the defendant in the required plea colloquy."<sup>132</sup> Judge Green's interference with the offered plea unfavorably affects Rojas's liberty interest. But does it violate Rojas's due process rights? The answer is no. The prosecutor is not offering a plea to a lesser charge, but just offering a lesser sentence for the same charge that the court judges ought to be more severely sanctioned. Basically the judge's discretion in this instance is unchallengeable. Even if the question were one of offering a reduced sentence, the court is under no obligation to accept a plea offered or negotiated.<sup>133</sup>

In Illustration Four, Judge Green is eager to impose a new sentencing option on "johns."<sup>134</sup> The sanction requires defendants to

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127. COMMUNITY COURT, *supra* note 83, at 8-10.

128. *Id.* at 8.

129. *Id.*

130. *Id.*

131. *Id.* at 8.

132. *Id.*

133. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3(e) (2d ed. 1992).

134. COMMUNITY COURT, *supra* note 83, at 9.



participate on a “community impact panel,” which, in effect, is a facilitated meeting between three defendants and three community members at which “the community would let the offenders know how they have affected the community; the offenders would be permitted to respond, to apologize, and to offer the community suggestions for dealing with the problem of prostitution.”<sup>135</sup> The sanction has been fashioned by the court’s community mediation specialist.<sup>136</sup> The defense bar has expressed some concern about the new sanction, particularly because information disclosed at such meetings might be usable against the defendant.<sup>137</sup>

Ronald Slip is the first defendant to be subject to the new sanction.<sup>138</sup> He has been arrested for soliciting sex for money from a police officer.<sup>139</sup> The prosecutor offers the new sanction as part of the plea.<sup>140</sup> Susan Jones, the defense counsel, is aware that Slip would not be sentenced to any jail time in the centralized court.<sup>141</sup> She is also aware that requesting an adjournment to the centralized docket would require additional trips to court for Slip.<sup>142</sup> In the end, after discussing the offered sanction with Slip, Jones announces that Slip is prepared to accept the offer.<sup>143</sup> The actual discussion between the two is not reported, but we can assume that it would not differ much from the conversation that took place in the drug court illustration.

But screening these cases through Judge Green’s commitment to community input might result in a different outcome. Does the fact that the court is committed to community service in such instances make a difference? Judges have points of view on the value of various forms of sentencing and, as long as they are within the court’s authority to impose, such views are not disqualifying. But, if the commitment to community service is a product of agreement with the community that, for example, everyone charged with disorderly conduct will receive community service, then the defendant has been denied due process because her case, in effect, is not being heard.

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 10.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

## V. THE DOMESTIC VIOLENCE COURT

### A. Description

The West Jackson Domestic Violence Court was established to address a number of problems relating to the prosecution of domestic violence crimes.<sup>144</sup> Police officers did not take domestic violence with the necessary seriousness or were unaware of the grave dangers faced by complainants; abused women did not wish to press charges or testify; and defendants were often sentenced to probation without conditions, despite research that indicated that the risk of continued victimization was substantial.<sup>145</sup> At the time the West Jackson Court was established, attitudes about domestic violence had begun to shift, but the system remained unable to provide adequate resources to address the problems of how to protect the safety of domestic violence victims and to build a solid case against the defendant.<sup>146</sup> The goal of the court is “to ensure the safety and well-being of victims,” and to hold defendants accountable.<sup>147</sup> There are two prongs to this effort. The first is a concentrated effort to establish a “safety plan” for the victim and any children.<sup>148</sup> This is effected by the prosecutor’s office and victim advocates.<sup>149</sup> The second is to monitor the activities of non-incarcerated defendants.<sup>150</sup> The case begins in a normal arraignment part where bail or conditions of release are set.<sup>151</sup> The case is then sent to the domestic violence court, which is basically a court part dedicated to addressing domestic violence cases.<sup>152</sup> Judge Henderson presides in this court.<sup>153</sup> After a case has been put on his docket, he reviews the pre-trial status of each defendant.<sup>154</sup> He makes sure that every defendant is subject to a protective order.<sup>155</sup> And “[d]efendants who are not held pending trial are required to attend a batterers [sic] counseling program once a week as a means

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144. CTR. FOR COURT INNOVATION, CASE STUDY: WEST JACKSON DOMESTIC VIOLENCE COURT 3 (1999) [hereinafter DOMESTIC VIOLENCE COURT]. The Case Study is reprinted in Appendix 3 with permission from the Center for Court Innovation.

145. *Id.* at 2.

146. *Id.*

147. *Id.* at 3.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 4.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

of keeping tabs on them.”<sup>156</sup> Also, it is significant to note that case studies attribute no remedial value to the counseling program, describing it as “a means of keeping tabs on them.”<sup>157</sup>

Key to the success of this court is its monitoring program. The center of this program is the resource coordinator, a court staff member who sits in the well of the court.<sup>158</sup> The coordinator’s job is to maintain a computer database on the status of both the defendant and the victim, and to report regularly to the judge.<sup>159</sup> Sources for this data are the batterer’s program, police, victim advocates, probation officers, and others.<sup>160</sup> The normal monitoring progress is a status hearing with the defendant every two or three weeks.<sup>161</sup> Prior to the hearing, the judge reviews the case status with the coordinator.<sup>162</sup> If an issue is raised, the judge confronts the defendant with the issue and gives him an opportunity to respond.<sup>163</sup> If the defendant is non-compliant, the judge may change his release condition or detain him.<sup>164</sup> If an emergency arises, for example, threatening the complainant, the coordinator is supposed to be notified and an immediate hearing is scheduled.<sup>165</sup>

At some point, defendants will plead guilty or go to trial. No defendant who pleads guilty or is convicted is given straight probation.<sup>166</sup> At a minimum, defendants on probation must return to court every two months and visit regularly with their probation officers.<sup>167</sup>

### B. The Judge Speaks Out

Illustrations One and Two of the Domestic Violence Case Study focus on Judge Henderson outside of the courtroom.<sup>168</sup> In Illustration One, Judge Henderson has convened his monthly “domestic violence court partner session,” meetings “between all of the entities who work together on domestic violence cases.”<sup>169</sup> Included at

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156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 5.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 5-7.

169. *Id.* at 5.

this session are “a number of West Jackson police officials, probation officers, court clerks, intervention counselors for batterers, staff from the local domestic violence shelter, victim advocates, jail staff, and the domestic violence court’s resource coordinator.”<sup>170</sup> In Illustration Two, Judge Henderson is at the women’s centers at the state college, speaking on a panel on domestic violence.<sup>171</sup> With him is an advocate for a victim’s group, the chief of police, and a local prosecutor. As part of his presentation, Judge Henderson observes:

In the past, our society viewed domestic violence as a private matter. . . . Problems between husbands and wives, boyfriends and girlfriends, and same-sex partners were considered outside of the law. Luckily, times have changed and courts all over the country have finally begun to work cooperatively with police, prosecutors, and battered women’s advocacy organizations to protect victims, ensure their safety, and hold abusers accountable for their actions.<sup>172</sup>

And in retort to a question from a female student, who had felt fearful and angry after an earlier West Jackson domestic violence murder, he noted that “[the] domestic violence [court] was created to address her concerns.”<sup>173</sup>

Illustration One raises the same concerns raised by Judge Green’s community advisory board. Illustration Two raises a more traditional judicial question regarding what limits, if any, ought be placed on public outreach. Applicable again is the discussion of Judge Green’s community advisory board. In short, “a judge ought to be able to express an opinion—pro or con—about controversial legal issues, as long as neither the words nor the context suggest an unwillingness to follow the law. . . .”<sup>174</sup> There is nothing in Judge Henderson’s statement that would seem to offend this standard, by aligning himself with a particular side on a political debate or prejudging a particular case.

### C. The Batterer’s Program

Illustrations Three and Four return us to the court room. Illustration Four focuses on the extension of an order of protection and

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170. *Id.*

171. *Id.*

172. *Id.* at 7.

173. *Id.*

174. SHAMAN ET AL., *supra* note 124, at 333; see *In re Sanders*, 955 P.2d 369, 374 (Wash. 1998).

the question of whether such an order should stop a couple from seeking counseling.<sup>175</sup> The problem is the absence of the complainant and no evidence that she wishes the order to allow such family counseling.<sup>176</sup> The events described signal no particular problem-solving court problem discussed elsewhere or any problem at all.<sup>177</sup> In Illustration Three, the defendant, Chin, is asking for a bail reduction.<sup>178</sup> Chin has been accused of assaulting his girlfriend, Wanda Smith.<sup>179</sup> The prosecutor is willing to agree to lower bail if the defendant agrees to a curfew and participation in a batterer's intervention program.<sup>180</sup> The defense counsel objected to this conditioned bail reduction, arguing that Chin has no record of domestic violence and that participation in the batterer's program and the curfew will harm his reputation and interfere with his work.<sup>181</sup> The defense counsel also argued, "[I]f the allegations in this case involved strangers, you would not be ordering any kind of condition of release—let alone a batterer's program."<sup>182</sup> Judge Henderson ignores this argument, as well as Chin's assertion of his innocence, and consequential protestation that the program would have no value for him.<sup>183</sup> In response to this latter point, Judge Henderson declared:

I'm not sending you to this program for your benefit—it's for the benefit of Ms. Smith and the people of West Jackson. . . . While you are awaiting trial, it is my job to make sure I know what you are doing, when, and how. As for your guilt or innocence, you'll have your day in court to present a defense, if you so choose.<sup>184</sup>

Chin capitulates, is monitored for several months, including receiving calls at home from Judge Henderson, and is finally tried and acquitted.<sup>185</sup>

The above exchange demonstrates a unique aspect of domestic violence courts. The "problem-solving" occurs prior to the disposition of the case, whether that disposition is through plea or trial.

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175. DOMESTIC VIOLENCE COURT, *supra* note 144, at 9.

176. *Id.*

177. *Id.*

178. *Id.* at 7.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 8.

183. *Id.*

184. *Id.*

185. *Id.*

This means that Chin is being sent to a batterer's program, and is subject to a curfew without admitting to, or being adjudicated, a batterer.<sup>186</sup> In this case, the defendant must choose between jail (in lieu of bail) or the proffered conditions. This seems a bit odd given Judge Henderson's concerns about the protection of the complainant and the weekly program attendance requirement.<sup>187</sup> Perhaps Judge Henderson was concerned that he could not maintain this high level of bail, or any bail, given Mr. Chin's profile, or that he might make the bail.<sup>188</sup> Apparently, though, such program attendance is a requirement for any alternative to pre-trial incarceration.<sup>189</sup> Judge Henderson will require a defendant, already out on his own recognizance, to attend the program as an added condition of that defendant's continued release.<sup>190</sup> According to the Domestic Violence Case Study, "defendants who are not held pending trial are required to attend a batterer's counseling program once a week as a means of keeping tabs on them."<sup>191</sup> The fact that problem-solving in domestic violence courts precedes disposition should heighten judicial attention to the due process protections afforded defendants whose guilt has yet to be established.

Considering the due process concerns, what constitutional grounds support Judge Henderson's requirement of attendance in a batterer's program, a limitation on the defendant's physical and reputational liberty? The traditional basis for pre-trial detention, risk of flight,<sup>192</sup> does not seem to be an issue in this case. Rather the argument is that attendance at the batterer's program is necessary to protect a witness, in this case, the abused complainant. Does such a purpose support commitment to a batterer's program? The United States Supreme Court has determined that the Due Process Clause supports additional pre-trial detention purposes, such as protecting a witness,<sup>193</sup> or obstructing justice. Similarly, in *Schall v. Martin*, the Supreme Court upheld a statute that permitted the pre-trial detention of a juvenile on any charge after a demonstration that the juvenile might commit some undefined future

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 4.

190. *Id.*

191. *Id.*

192. *See* *Bell v. Wolfish*, 441 U.S. 520, 523 (1979); *Cooper v. Morin*, 399 N.E.2d 1188, 1195 (N.Y. 1979).

193. *United States v. Salerno*, 481 U.S. 739, 748-49 (1987) (upholding the Federal Bail Reform Act of 1984).

crime.<sup>194</sup> State courts, as a general matter, need not<sup>195</sup> and have not read their constitutions as broadly.<sup>196</sup> The New York Court of Appeals, for example, has pronounced that, under its due process clause,<sup>197</sup> “[t]he only legitimate purpose for pre-trial detention then is to assure the presence of the detainee for trial.”<sup>198</sup> Nevertheless, New York’s lower courts have allowed behavioral modification programs as a condition of bail.<sup>199</sup> In one such case, in fact, a trial court upheld attendance at batterer’s program as a condition of release.<sup>200</sup> The judge reasoned that:

Until there is a determination of guilt or innocence the court is responsible not only to seek justice by safeguarding the rights of the defendant; it must also insure that the complainant is secure and that societal peace is preserved during the pendency of the action. Directing a defendant to attend alternative to violence courses helps insure this.

Rather than implying guilt, attendance at the program, in tandem with its educational benefits, reminds the defendant, as does the order of protection, that although at liberty, he is still bound by the dictates of the court, which can rescind his liberty on his failure to abide by those dictates.

In requiring attendance at such programs, the court feels it is less likely that a temporary order of protection will be violated. Such a condition thus assists the court in its responsibility to secure the peace and protect the family.<sup>201</sup>

This reasoning is too quick, at least as it relates to the Domestic Violence Court Case Study. It basically draws its analysis from the federal jurisprudence that holds that non-punitive, rational alternative bail purposes are constitutionally supportable, if not excessive in relationship to the alternative purpose.<sup>202</sup> Punishment is defined as a restriction on liberty that does not have another legitimate government purpose that such restriction rationally furthers.<sup>203</sup> Attendance at a batterer’s program has a branding effect on a de-

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194. *Schall v. Martin*, 467 U.S. 253, 281 (1984).

195. *See People v. Keta*, 593 N.E.2d 1328, 1331 (N.Y. 1992) (finding greater protection for the defendant’s right against search and seizure in the state constitution).

196. *See LaFave & Israel, supra* note 133, § 12.3(a).

197. N.Y. CONST. art. I, § 6.

198. *Cooper v. Morin*, 399 N.E.2d 1188, 1195 (N.Y. 1979).

199. *See, e.g., People v. Bongiovanni*, 701 N.Y.S.2d 613, 614 (Sup. Ct. 1999).

200. *Id.*; *see Halikipoulos v. Dillon*, 139 F. Supp. 2d 312, 318 (E.D.N.Y. 2001) (upholding a shoplift program as a condition of bail).

201. *Bongiovanni*, 701 N.Y.S.2d at 614.

202. *See United States v. Salerno*, 481 U.S. 739, 747 (1987); *Bell v. Wolfish*, 441 U.S. 520, 537-38 (1979).

203. *See Bell*, 441 U.S. at 539.

defendant's reputation, which is part of a person's liberty interest.<sup>204</sup> It is hard to understand subjecting Chin to such a substantial diminishment of his liberty right for such limited state purpose. Unlike the court in *People v. Bongiovanni*,<sup>205</sup> Judge Henderson provides a much more accurate description of the program's goal—to allow the court to keep tabs on Chin.<sup>206</sup> But how weekly attendance at the program effects this goal is unclear. It also seems unnecessary, given the availability of the curfew and other alternatives, such as the order of protection and continuous reporting to a parole officer. Simply put, the program appears to be of no real value, consequentially, it seems punitive. Thus, Chin is being required to attend an almost valueless batterer's program because of a complaint, which he denies.

If attendance at a batterer's program is a punishment, it may also raise double jeopardy issues. Under Supreme Court doctrine, a defendant cannot be subject to multiple punishments for the same offense.<sup>207</sup>

Even if Judge Henderson has the authority to compel Chin's attendance at the batterer's program, the procedures used to arrive at this restriction do not satisfy procedural due process. Chin is still entitled to an individual determination that he presents a threat to the complainant.<sup>208</sup> Such a determination does not constitutionally require a mini-trial with attendant procedural rights, particularly given the relative minimum restriction of weekly attendance at the program.<sup>209</sup> But it does require that the state assert reasons or evidence why the defendant ought to be retained or subject such a level of bail.<sup>210</sup> It does require that the defendant be offered an opportunity to assert the reasons why he ought not be subject to the conditions requested by the state.<sup>211</sup> From these arguments, the court must make a judgment on whether to limit or condition the defendant's fundamental right to liberty.<sup>212</sup>

According, to the New York State Court of Appeals:

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204. See *Quinn v. Shirey*, 293 F.3d 315, 319 (6th Cir. 2002) (citing *Chilingirian v. Boris*, 882 F.2d 200, 205 (6th Cir. 1989)).

205. *Bongiovanni*, 701 N.Y.S.2d at 614.

206. See DOMESTIC VIOLENCE COURT, *supra* note 144, at 8.

207. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

208. The rationale for using weekly attendance at the batterer's program for this purpose is elusive, given the court's skepticism over its tempering value.

209. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

210. See *People ex rel. Lobell v. McDonnell*, 71 N.E.2d 423, 425 (N.Y. 1947).

211. See *id.*

212. See *id.*



The bailing court has a large discretion, but it is a judicial, not a pure or unfettered discretion. The case calls for a fact determination, not a mere fiat. The factual matters to be taken into account include:

“The nature of the offense, the penalty, which may be imposed, the probability of the willing appearance of the defendant or his flight to avoid punishment, the pecuniary and social condition of defendant and his general reputation and character, and the apparent nature and strength of the proof as bearing on the probability of his conviction. . .”<sup>213</sup>

At a minimum, taking into account factual matters, requires an impartial judge, at least one willing to assess and weigh the arguments for and against restrictions on Chin’s liberty. Is Judge Henderson constitutionally impartial? Both his public speech and expressed anger toward Chin would suggest a negative answer. The charge itself appears to be determinative for Judge Henderson, leading to the conclusion that such a charge in this court carries with it an irrebuttable presumption that the defendant is too dangerous to be released without conditions. This is not to argue that Judge Henderson, like Judge Smith of the drug court, cannot have a point of view on the treatment of certain categories of defendants; but only to argue that advocacy cannot be or appear to be determinative without regard to the case’s particular facts.

These criticized practices of Judge Henderson do not seem central to the due process success of the domestic violence courts. Neither refusing invitations to anti-domestic violence “rallies,” nor restraining one’s comments concerning the perceived virtues of domestic violence courts would appear to end their effectiveness. Affording the defendant a reasonable opportunity to present his arguments for relief would not appear to end their effectiveness either.

### CONCLUSION

The above analysis of problem-solving courts is based on case studies intended to portray “typical” problem-solving courts. The comparative aspects of this analysis are with the McJustice courts and not an idealized version of the court system. The goal of problem-solving courts are to restore a sense of order and justice to a judicial system that to many seems chaotic and broken. Whether these courts are successful awaits future judgment. Addressing

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213. *See id.* (quoting *People ex rel. Rothensies v. Searles*, 243 N.Y.S. 15, 17 (App. Div. 1930)).

some due process concerns now will improve their chances for success. These concerns resolve around judicial activism, which, in the case of community courts, undermines judicial independence and, in the case of domestic violence courts, punishes prior to conviction.

## APPENDIX 1\*

CASE STUDY: STANFORD DRUG  
TREATMENT COURT<sup>214</sup>

## CONTEXT

*Recent years have witnessed an explosion of drug-related crime. The evidence can be seen on the nightly news and felt in our courtrooms. According to the Federal Bureau of Investigation, almost 1.6 million state and local arrests were made for drug law violations in 1997.<sup>215</sup> During that same year, in both Chicago and New York City, approximately 80% of adult males tested positive for illicit drug use at the time of their arrest.<sup>216</sup> Drug crime recidivism is a large part of this story: the Justice Department estimates that more than half of defendants convicted of drug possession are likely to recidivate with a similar offense within two to three years.<sup>217</sup>*

## BACKGROUND

Frank Smith is a judge in the Stanford criminal court system. Over the years, he has been assigned to arraignments, a misdemeanor calendar, and a general felony docket. By 1997, his 12th year on the bench, Judge Frank Smith had handled hundreds of cases—conducting hearings, ruling on motions and presiding over trials. Many of the cases presented a different version of the same tale: indigent defendants arrested for non-violent, drug related

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\* EDITOR'S NOTE: This Case Study has been reprinted with permission from the Center for Court Innovation. The Case Study has undergone only minimal editing.

214. This case study is one of a set of case studies written by the Center for Court Innovation in 1999 as part of the briefing materials for a series of roundtables that brought together leading academics and practitioners to explore some of the ethical and legal challenges presented by problem-solving courts. These case studies were not intended to describe best—or even appropriate—practice in problem-solving courts. Instead, they were deliberately written to highlight possible tensions between problem-solving courts and traditional practice in the courts and to provoke conversation among roundtable participants. The case studies were written by a team that included: Greg Berman, John Feinblatt, Scott Schell, and Mae Quinn. The Center for Court Innovation would like to offer thanks to the following people who commented on earlier drafts of the case studies: Cait Clarke, Susan Knipps, Eric Lane, Roy Simon, and Michael Smith.

215. OFFICE OF NAT'L DRUG CONTROL POL'Y, DRUG POL'Y INFO. CLEARINGHOUSE, DRUG DATA SUMMARY 2 (April 1999).

216. NAT'L INST. OF JUSTICE, ADAM 1997 ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES (NCJ-171672).

217. OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIV., LOOKING AT A DECADE OF DRUG COURTS 6 (June 1999).

crimes. And, in all too many cases it seemed the defendants were drug addicts.

Unfortunately, the only sentencing options that were readily available to Judge Smith were incarceration or probation. Given limitations on resources and the number of addicted offenders serving time, it was almost certain that a defendant sentenced to incarceration would receive little in the way of drug treatment. Similarly, overworked probation officers often did not have the time, resources, or energy to find appropriate treatment programs, let alone diligently monitor defendants who were ordered to obtain treatment as a condition of probation. As a result, almost all addicted defendants passed through the system without meaningful intervention to curb their addiction.

And, in the end, whether Judge Smith sentenced an individual defendant to incarceration or probation, it was rarely the last time the defendant would see a courtroom. Some time later—five years? three years? six months?—the defendant would wind up back in the system again, re-arrested for another offense. Then the whole process would begin all over, sometimes in front of Judge Smith and sometimes in front of another judge, with higher stakes for the defendant who was by this time a predicate felon. In essence, feeling like his work wasn't making much of a difference, that he had become part of what critics were calling the "revolving door" of justice, Judge Smith grew more and more frustrated. This frustration drove Judge Smith to consider the broader implications of his own efforts. If addiction was driving the majority of his caseload, shouldn't the court be doing something about it?

### PLANNING

Finally, in 1997, Judge Smith decided to lead an effort to establish a drug treatment court modeled after the country's first drug court launched in Dade County, Florida in 1989. Judge Smith proposed to court administrators that all non-violent felony drug cases in the region be routed to a single, specialized courtroom, over which he would preside. The goal of the court would be not only to adjudicate the facts of the case, but also to address the problem that brought the defendant to court in the first place: namely, addiction. The idea was straight-forward—the court should actively try to solve the underlying problem of addiction in addition to processing the case. It would use its coercive power to achieve the concrete goal of moving defendants from addiction to sobriety.

After numerous meetings, Judge Smith won the support of court administrators, elected officials, and community advocates. Others were more skeptical. For instance, the local defense bar was concerned about diverting judicial attention and energy away from determining whether defendants were guilty or not guilty. And, since much of the information disclosed by individuals in treatment is usually treated as confidential, the thought of having a judge become actively involved in defendants' progress in treatment raised eyebrows. Moreover, defense attorneys were nervous about the potential for judicial prejudice of their clients, as well as the danger of widening the net of government control over them.

Police were also worried about the implications of the new court. They wanted to know what impact it would have on their work. Would the court be soft on crime? Would their drug enforcement efforts be a waste of time since defendants would be going to treatment and having their cases dismissed?

Despite these initial questions and concerns, over time, local prosecutors, defense attorneys, police, probation officers and drug treatment providers all came to the table, willing to test a new approach to what everyone agreed was a problem that had resisted conventional solutions. Together, they worked with Judge Smith to create a pilot program, using funds provided by the federal government.

The program was based upon the notion that a court could use its coercive power to engage defendants in drug treatment. By establishing a framework for handling cases and making treatment available, and by gaining the support of prosecutors and defense counsel for this structure, the drug court sought to substantially eliminate case-by-case judgments regarding sanctions and rewards. Defendants receiving help for their drug problems would become the norm, rather than an exception. Moreover, each defendant would have a good understanding of what the deal was before agreeing to participate.

### **DRUG TREATMENT COURT MODEL**

The Stanford drug court, like most others, uses a "teamwork" approach. The team—consisting of Judge Smith, the prosecutor, defense counsel, court social workers, and offsite treatment providers—works together each day towards the goal of helping addicted defendants achieve and maintain sobriety.

Under the scheme adopted during the planning process, the district attorney determines which cases coming into the system

should be routed to the drug treatment court. To accomplish this task, intake prosecutors review all new felony drug cases to see if they have features that would make them ineligible for the drug court. As indicated in written eligibility guidelines, cases involving alleged high-level drug dealers, drug ring organizers, or dealing near schools, are usually left to be handled by regular criminal court judges. While defense counsel has no formal role in deciding which cases are selected, some defense lawyers have contacted the screening prosecutor to argue for diversion. Sometimes these efforts prove successful. Sometimes not.

Cases routed to the drug court are prosecuted by a designated drug court assistant district attorney, Paula Phillips. Ms. Phillips has served as a Stanford prosecutor for ten years. She has worked on hundreds of drug cases, and was selected for the job based upon her experience and interest in the project.

Similarly, most cases calendared in the drug court are assigned to a single public defender, James Simkins. Mr. Simkins was originally opposed to working as a “team” member in a drug court. At first blush the thought of regular collaboration between the prosecutor and defense counsel seemed antithetical to the notion of zealous advocacy. And he recalled being taught that a defense attorney should be concerned about a client’s expressed interest, not necessarily his best interest—even though he now understands that the choices for a practicing defense lawyer are seldom so black and white. After reflecting on the complexities of representing defendants and receiving some encouragement from Judge Smith—a judge before whom he had appeared on many occasions—Mr. Simkins decided to accept the assignment.

At the outset, Mr. Simkins did not wholeheartedly “sign on” to all components of the program. Nevertheless, he approached the position with an open mind. After all, he saw first-hand the devastating impact of addiction on his clients’ lives. And he knew from experience that those defendants who did not receive treatment were likely to recidivate. He felt certain that this new program would complicate the decisions faced by his clients, but he also was intrigued by the possibility that his clients would receive meaningful help for the problems that brought them into the system.

Once they are routed to the drug court, defendants meet with a drug court social worker for a full addiction assessment to screen out those cases where defendants do not need drug treatment. The drug court hired its own social workers for this job, rather than asking the local probation department or pretrial services agency

to fulfill this role. These hires were possible because of funds provided by the federal government. However, it is the hope of the court that the state legislature will provide funding for the salaries of the social workers in future court administration budgets.

Because of the confidentiality concerns flagged by defense counsel during planning, defendants are asked to sign waivers allowing for a limited disclosure of information learned during the initial assessment. In most cases, the defendant signs the waiver after receiving an explanation from the social worker assigned to the case, but without the advice of a lawyer. The initial assessment allows social workers to form treatment recommendations based upon information such as the defendant's criminal record, his present charges, the severity of his addiction, his community ties, and his employment and housing status. This information also is available for the court to consider.

Defendants who plead guilty to charges against them in the drug court, usually a reduced felony count, are ordered into a recommended drug treatment program by Judge Smith. If they successfully complete treatment, the plea is vacated and the charge is dismissed, leaving them without a conviction—a substantial incentive for participation.

The treatment programs used by the court are community-based programs run by private, non-profit agencies that were solicited by court administration staff. Both in-patient and out-patient in nature, these programs last anywhere from a few months to two years in duration. There is a close working relationship and extensive communication between the court and the community-based programs; the court informs the treatment programs of each defendant's compliance conditions, and the programs keep the court informed as to defendants' progress. The programs promise to make treatment slots available to the court, in exchange for the court's commitment to make use of them.

Judge Smith—using a carrot and stick approach—plays a significant role in moving defendants from addiction to sobriety. Judge Smith follows the progress of each defendant in treatment through updates frequently provided by the community-based programs. Successful defendants are rewarded with applause, reductions in the frequency of court appearances, and writing journals. Relapsing or non-compliant defendants are quickly confronted and must pay the consequences of graduated sanctions. Sanctions run the gamut from writing essays to sitting in the courtroom all day to spending a week in jail. The sanctions for non-compliance are

spelled out for defendants in treatment agreements they sign at the time they enter their guilty plea. The drug court takes into account the realities for addicts trying to kick their substance abuse habit, allowing them a number of opportunities to return to treatment after relapsing. However, if over time a defendant fails to successfully complete a court ordered drug treatment program or is re-arrested, the case will proceed to sentencing before Judge Smith.

#### ILLUSTRATION ONE

At 8:45 in the morning, attorney James Simkins meets with defendant Charles Rogers in a court holding cell to discuss Mr. Rogers's upcoming hearing before Judge Smith. At the last hearing, two days before, the government offered to allow Mr. Rogers to plead guilty to a lesser felony count of possession with intent to distribute cocaine versus distribution of cocaine for which he was originally charged. If Mr. Rogers pleads guilty, he would be ordered into an 18-month in-patient drug treatment program and if he successfully completed treatment, the charges against him would be dismissed. If he fails to complete the program, he would serve 36 months' incarceration. "Mr. Rogers," Mr. Simkins begins, "I know we have discussed your case a number of times, but I just want to be sure you understand your options. The prosecution has offered to let you plead to a lesser offense as part of the treatment diversion offer. If you reject this offer you are facing up to 25 years if convicted of the top charge."

Defendant Rogers tells Mr. Simkins he understands that part, but doesn't understand the treatment component and why the court would be interested in dismissing the charges against him.

"Well," Mr. Simkins explains, "this is a drug treatment court. In these courts, the goal is making sure you get help for your addiction. So, after you plead guilty, instead of serving a regular sentence, the court would order you into the drug treatment program recommended by the social worker you met with a few days ago. In your case, the social worker has recommended that you be placed in an 18 month in-patient drug treatment program."

"How did she come up with that?" Mr. Rogers asks.

Mr. Simkins continues, "The social workers are specially trained in addiction cases. Your social worker considered all the information you gave her—about your history of drug usage, your drug of choice, the amount of drugs you use on a regular basis, your criminal history, your housing needs, and other things. She made her decision based on her experience and with the help of the court's



computer program—which calculates all the information she inputs and spits out an analysis of your level of addiction. The recommendation is pretty standard for people with your history of drug use and the charge you’re facing.”

“Look, I know they found twelve rocks in my shoe when they searched me. But I thought you said you could try to get the case thrown out.” Mr. Rogers tells Mr. Simkins.

“Well, nothing is certain, but you do have a pretty good Fourth Amendment issue. If the judge agrees that the police didn’t have the right to stop you, the drug evidence against you would be suppressed. But,” Mr. Simkins warns Mr. Rogers, “you would be taking a real risk by going forward on a motion to suppress. If the judge didn’t throw out the evidence, you’d be back where you are now, except the amount of time you’d be facing would probably be more.”

“What do you mean? Why more time?” Mr. Rogers asks.

“Right now, even though under the statute you can get up to ten years in jail for possession with intent to distribute cocaine, the government has agreed that your “back up” time would only be 36 months’ incarceration. So, if you failed out of treatment, or took off, or got rearrested—the worst you would get on this case would be 36 months. That’s if you take the deal today. If you don’t take the deal today and we lose on the motion, the government will probably ask for more backup time. That’s the way it works. Let me be clear: you can always ask for treatment in this court, but the longer you wait, the more time you would likely face if you don’t follow through with your program. Does all of that make sense?”

Upset, Mr. Rogers asks: “Can they do that? Try and force me to get treatment?”

Mr. Simkins explains that they don’t have to offer him any deal at all, and reminds him that he is presently facing up to 20 years since he is charged with distribution.

“Well, what do you think I should do?” Mr. Rogers asks, “You’re my lawyer.”

“The ultimate decision has to be yours Mr. Rogers,” Mr. Simkins begins. “I think you have a really good suppression issue—not a slam-dunk, but good. Aside from the legal questions, though, you should ask yourself what you think is best for you. Even if we got this charge dismissed, where would you be? You told me you thought you needed to clean up. Here you have been given the chance to get off the street for a while. I’m not saying it would be easy—you’d have to come back to court every two weeks, do drug

tests all the time, and lose your freedom for a while. It's a good deal, though, if you can make it through."

Mr. Rogers asks Mr. Simkins: "So, if I test dirty, then I've gotta do the time?"

"No, you won't fail out with a few dirties; but you will face sanctions. You'll have to sign an agreement when you enter the plea saying you agree to the sanctions in advance—so you'll know what they are. For instance, after a certain number of dirty urine tests you would spend a weekend in jail. Too many mistakes, though, could result in you having to do your agreed upon sentence."

"Man, I don't know what to do," Mr. Rogers says. "A year and a half in a program is a long time, especially if I still might wind up doing time anyway. But, I do want to start cleaning up. Things have gotten pretty messed up for me lately."

"Well, think about it. Your case won't be called for about another fifteen minutes or so. I'll come back right before the Judge takes up your case to find out what you decide."

Judge Smith calls the case of *State v. Charles Rogers* at 9:15 a.m., at which time the defendant enters a guilty plea and agrees to enter drug treatment.

## ILLUSTRATION TWO

The next case to be called is that of *State v. Laura McManna*, an update on a defendant who entered the drug court program some months before. Looking at the computer monitor on the bench, Judge Smith sees that Ms. McManna tested positive for cocaine when she came into the drug court for her first update on her progress in treatment. Since receiving a sanction of two days' courtroom observation at that time, however, Ms. McManna has stayed off of drugs, testing negative for a total of three months. Reports from her in-patient treatment provider, Pine Hills Rehabilitation Facility, indicate that she is complying with the rules and regulations of the program.

"Ms. McManna," Judge Smith begins, "I see you continue to do well in your program and that your drug test results continue to come back clean. Do you know what you looked like when you first came before me? If you need a reminder, I can show you a photo that was taken three months ago. Now look at you: clean, well-dressed, ready to take on the world. I am very proud of you. More importantly, however, you should be very proud of yourself."

"I am, your honor," Ms. McManna replies flashing a smile.

Defense counsel Simkins chimes in: "Judge, I also wanted to point out Ms. McManna is in the process of preparing to take her GED exam."

"That's great," Judge Smith replies, "I'm sure going back to get your diploma isn't an easy thing. It sounds like you're really taking control of your life. And, since you are doing such a great job, I think it's time you were rewarded."

Judge Smith steps down from the bench and walks towards the defense table carrying a leather-bound journal. "Ms. McManna, we'd like to present you with this award for all your hard work. You can use this to keep track of your progress through treatment. Congratulations and keep up the good work."

As Judge Smith hands the journal to Ms. McManna, the whole courtroom, including defense counsel Simkins, assistant district attorney Phillips, the courtroom officers and the judge's clerk, begin to applaud.

As the applause dies down, Mr. Simkins remains standing. "Your honor, since Ms. McManna is doing so well in her treatment program, we would like to make a request. Ms. McManna wishes to complete her treatment at an out-patient program rather than at Pine Hills. After she takes her GED exam next week, Ms. McManna is interested in trying to go back to work. Your honor has recognized how well she is doing, and I think Ms. McManna will be able to make it in a less structured program. I would suggest an outpatient program with daily reporting and weekly drug test requirements to give her the guidance she needs."

Judge Smith asks the state about its position. Assistant district attorney Phillips tells Judge Smith she would take no position as to the request. She agrees that Ms. McManna is doing very well, but is not sure if switching to an out-patient program at this time would be in her best interest.

"Counsel," Judge Smith begins, "I share the same concerns as Ms. Phillips. While I have tremendous faith in Ms. McManna, the in-patient program she has been in is obviously working for her. I am afraid if we change things now, we might run the risk of going back to square one. What I will do is talk with our clinical director during the lunch break and see what she has to say."

Closing down the court for lunch recess, Judge Smith stops by the office of the drug court's clinical director, Bill Brown. Mr. Brown supervises the court's social workers, and he is recognized to be the court's authority on the various community-based treatment programs used by the court. In speaking to Mr. Brown,

Judge Smith learns that 90% of those defendants who are able to successfully complete the first phase of the court's treatment component—remaining clean for four months—have either successfully graduated from the program or are still active in treatment after two years. As a result, it was Mr. Brown's opinion that it is very important for all defendants to be given as much support as possible to make it through phase one. With regard to Ms. McManna, Mr. Brown believes it would be best for her to remain in the in-patient program, at least until she makes it past the four month threshold.

Returning to the courtroom after the lunch break, Judge Green recalls Ms. McManna's case. "Ms. McManna, I have given your request a good deal of thought and have spoken with our clinical director, who is an expert on drug addiction. At this time I think you should continue at Pine Hills. If you are able to make it through the next month and stay clean, I will reconsider your request to be placed in an out-patient program. I am sure this is a disappointment for you. But please understand this is not meant to punish you. We all just want you to be able to graduate from the court."

### ILLUSTRATION THREE

Before reaching the next case on the status calendar, *State v. Frank Granada*, Judge Smith calls Mr. Simkins and Ms. Phillips into his chambers. "Counsel," Judge Smith begins, "what are we going to do with Mr. Granada? He tests clean for a while, seems to be doing well, and then just up and leaves his program. I got a report from Mr. Granada's social worker, Sandra Morris, that he absconded from the New Horizons program last week during an outing. He didn't call the program, didn't call the court, and didn't turn himself in. Instead, he was picked up on the warrant this morning after he was found sleeping on a bus. He tested positive for cocaine."

Judge Smith, the attorneys, and Ms. Morris, discuss Mr. Granada and his history with the court. The first time Mr. Granada left the program—a month ago—and came back on a warrant, the court sanctioned him with five nights in jail, as per the terms of the treatment agreement he signed when he entered the court. According to the agreement, when a defendant leaves a program a second time and involuntarily returns to the court, a sanction of between 15 and 28 days in jail will follow. A third time would result in termination from treatment and imposition of final sentence.

“Well your honor, I think Mr. Granada should be given the full jail sanction under the terms of his treatment agreement,” Ms. Phillips tells Judge Smith. “A month in jail might go a long way towards teaching Mr. Granada a lesson about taking the program seriously. He’s on the edge right now and needs to understand there can be no more next times. If he leaves the program again, he goes to jail on his sentence.”

“Clearly there is something going on here with Mr. Granada,” Mr. Simkins joins in. “But I’m convinced that sending him to jail for 28 days is not going to serve him well. I personally think the most important thing is for him to get back in treatment as quickly as he can. I’ve talked to Mr. Granada and he wants to give treatment another try. However, he mentioned having a number of problems with his current counselor at the program. Judge Smith, I urge the court to return Mr. Granada to New Horizons as soon as possible. Mr. Granada can succeed in this program if he is paired with a new counselor. I’m sure Ms. Morris’s intervention with the people at the treatment center would go a great distance toward arranging for this change.”

Ms. Morris tells the court that the New Horizons program is willing to give Mr. Granada another chance—but that they won’t have another bed available for two weeks or so. She also confirms that Mr. Granada was having some difficulties with his counselor at the facility.

“Okay,” Judge Smith says, “let me think about what everyone has said. I tend to agree that he should get back on track as quickly as he can. But he has to understand he can’t just make up the rules as he goes along.”

Thirty minutes later Judge Smith returns to the bench and calls Mr. Granada’s case. “So, Mr. Granada, I see we decided to take another walk from treatment so you could use drugs again. Your test results were positive for cocaine when you were brought in. I guess you thought that the agreement you entered into when you pleaded guilty in this case meant nothing.”

“No, your honor, that is not true. I left New Horizons but I was going to go back. I only left to visit my aunt. She’s real sick. And, I didn’t use cocaine when I was out. I took one of my aunt’s pain killers for this back injury I have—maybe that’s why the test is positive. But, I didn’t shoot up. I swear it.” Mr. Granada responds.

“Mr. Granada, I simply don’t believe you. I don’t think you visited your aunt, I don’t think you had any intention of going back, and I don’t think you used a pain killer. You want to know what I

do think? That you are simply in denial about your addiction. Now, don't you think it's about time you started to take responsibility for your actions? Mr. Granada, I am willing to give you another chance at treatment, but you are going to have to recognize you have a problem and recognize that you need help. If you don't complete treatment, you'll be facing four years in jail. Is that what you want, Mr. Granada?"

Defense counsel Simkins begins to respond on behalf of Mr. Granada, but is cut off by the court. "Counsel, I am talking to Mr. Granada. I want to hear what he has to say for himself." "Well, no, your honor, I don't want to go to jail. I want another chance at treatment. You're right. I messed up—but that guy over there at New Horizons, my counselor, he just keeps pushing my buttons."

"Mr. Granada, if by pushing your buttons you mean confronting you about your drug problem, I hate to tell you—that's just part of your therapy. No one told you this was going to be easy. But, you can't keep running from the program anytime you feel like it."

"I'll tell you what I am willing to do Mr. Granada," Judge Smith continues, "I'm going to send you to jail for the next fifteen days to cool out and give you some time to think about getting clean. In the meantime, we are going to have the social workers here talk with New Horizons and find out about getting you sent back to the program—if they'll still take you."

"Fifteen days?" Mr. Granada exclaims, turning to his attorney. "The last time I only got five days. Man, how can he give me so much time? I said I'd go back to the program."

Judge Smith explains to the defendant, "Mr. Granada, when you entered your guilty plea, you agreed to abide the court's sanctions schedule. And, here is a copy of your treatment agreement. It says right here in black and white that the sanction for leaving the program two times and coming back involuntarily is 15 to 28 days in jail."

Judge Smith, seeing Mr. Granada looking over the treatment agreement instructs him: "Turn to the final page of that agreement, Mr. Granada. Whose signature is that at the end of the document? Is that someone else's name? No, it's yours. No one forced you to sign that or told you that you had to enter a program. No, you were smart enough to know that you needed treatment—that the agreement was for your own good. So you see, Mr. Granada, you are quite lucky I am sending you to jail for fifteen days instead of a month, which I could do."

As Mr. Granada is being led out of the courtroom by the court officers, Judge Smith calls in the drug court social worker, Ms. Morris, and tells her to let him know what happens with New Horizons. "If they'll take him back" he tells her, "let's see if they are willing to switch him to another counselor's caseload. Maybe that will help him stay in the program."

After his exchange with Ms. Morris, Judge Smith turns to the attorneys in front of him and asks: "So, what do you think? Will he complete the program?"

Ms. Phillips shrugs and tells the judge she hopes that Mr. Granada makes it. Mr. Simkins agrees that its not clear whether Mr. Granada will make it, but he thinks a change in counselors certainly will improve Mr. Granada's chances.

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*According to a 1999 Department of Justice report, since the implementation of the first drug court in Dade County, Florida in 1989, over 357 drug courts have opened their doors. Plans for the creation of another 220 drug courts are underway. Based upon data from the 200 oldest drug courts in the United States, it is estimated that of the approximately 100,000 participants who have entered into drug court programs, 70% have either graduated or are still enrolled. According to one Department of Justice report, this retention rate is more than double the retention rate for traditional voluntary treatment programs. A number of studies have also demonstrated that drug treatment courts provide a tremendous cost savings to the justice system, given the extent to which drug court defendants are diverted away from pretrial detention and incarceration upon adjudication. Moreover, while additional, longer term studies need to be done, preliminary research indicates that criminal behavior is lowered by program participation, particularly for those defendants who graduate from drug treatment court.*

**APPENDIX 2\*****CASE STUDY: BROWNSBERG COMMUNITY COURT<sup>218</sup>****CONTEXT**

*Starting with the publication of the landmark essay, “Broken Windows” by George Kelling and James Q. Wilson in 1982, police and prosecutors have begun to recognize that creating and maintaining safe communities requires keen attention to quality-of-life crimes. Many cities have seen increased enforcement of offenses like illegal vending, prostitution, and vandalism. Unfortunately, few courts have been equipped to handle the infusion of petty cases. For example, over the past decade, the number of misdemeanor cases in New York City increased by 85% while the number of criminal court judges remained constant. Overwhelmed by staggering caseloads, many courts, particularly in urban areas, struggle to get through their daily calendars. All too often, individuals charged with low-level offenses are sentenced to nothing more than the process of being arrested and arraigned. In New York, a review of a random sample of misdemeanor cases from 1992-93 showed that roughly half of the defendants received “walks”—sentences where no additional conditions were placed on defendants. The consequences of this are significant, both within the criminal justice system, where cynicism is rampant, and among the general public, where public confidence in courts has suffered.*

**BACKGROUND**

The city of Brownsberg is a busy metropolis of more than one million people. Its downtown area has long drawn both residents and visitors from outside the city looking for entertainment. With

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\* EDITOR'S NOTE: This Case Study has been reprinted with permission from the Center for Court Innovation. The Case Study has undergone only minimal editing.

218. This case study is one of a set of case studies written by the Center for Court Innovation in 2000 as part of the briefing materials for a series of roundtables that brought together leading academics and practitioners to explore some of the ethical and legal challenges presented by problem-solving courts. These case studies were not intended to describe best—or even appropriate—practice in problem-solving courts. Instead, they were deliberately written to highlight possible tensions between problem-solving courts and traditional practice in the courts and to provoke conversation among roundtable participants. The case studies were written by a team that included: Greg Berman, John Feinblatt, Scott Schell, and Mae Quinn. The Center for Court Innovation would like to offer thanks to the following people who commented on earlier drafts of the case studies: Cait Clarke, Susan Knipps, Eric Lane, Roy Simon and Michael Smith.



a heavy concentration of bars, clubs, restaurants, movie theaters, and hotels, downtown is seen as both the seediest and trendiest part of the city. For many, the downtown area's noise, traffic and general commotion are part of its attraction.

The area has also long been known for low-level criminal activity: prostitution, drug dealing, public drinking, and vandalism. About five years ago, disorder started to become more pervasive. People seeking entertainment started avoiding the area after dark. Businesses suffered. Empty, unlit storefronts, in turn, invited additional crime.

To local residents and business people, it seemed that the justice system was doing little to slow this downward spiral. Brownsberg's centralized criminal court, bogged down with serious criminal matters and a huge backlog of cases, spent little time on downtown's relatively unimportant quality-of-life offenses. Less than one half of 1% of the misdemeanor cases went to trial. More than 75% of misdemeanor cases were disposed at arraignment. The most common sentence for these minor crimes was "time served"—the time a defendant spent locked up awaiting arraignment. The process had become the punishment. Thus, there was no real differentiation between those who were guilty of the crimes charged and those whose cases were dismissed. After a day spent in the arrest-to-arraignment process, many defendants simply returned downtown and resumed their commission of petty offenses. After a while it seemed that police started making fewer arrests of low-level offenders, seeing such work as a waste of time. Why should they bother if the courts were simply going to release offenders without punishment?

Block associations and other citizens groups banded together to try to stem the deterioration of their neighborhood. They wrote letters to their legislators, met with city agency officials, and complained to the police. Uniformly, they received a sympathetic but unhelpful response: "the system" wasn't working, but no one knew how to fix it.

Then at a conference on urban justice two years ago, a court administrator who lived in Brownsberg heard a presentation about the Midtown Community Court that had been created in New York City in 1993. He wondered if that model would work in his city—could a court work hand-in-hand with the community to address the problems plaguing downtown Brownsberg? Could such a court slow or even reverse the steady decline in the area's quality of life?

### PLANNING

Towards this end, over several months, planners from the Brownsberg court system conducted focus groups with neighborhood residents, local business owners, criminal justice experts, police, social service providers, and others to ascertain the exact nature of the concerns and needs of the downtown area. Nearly everyone involved expressed frustration with business-as-usual, which took low-level offenders to a centralized court far removed from the downtown area, and hardly ever provided more than the proverbial slap on the wrist for those who committed crimes. Those who were sentenced were seldom made to pay back the downtown community for their wrongdoing. It was clear that both the community and the local police blamed the government in general, and the court system in particular, for failing to do enough. For them, the courts seemed to be little more than a revolving door, which did not do enough to restore their neighborhood or prevent criminals from re-offending.

In addition to wanting local, quality-of-life crimes to be taken more seriously, many of those who participated in the focus groups also pointed out the value of providing help for those committing crimes in the neighborhood. Shoplifters were often drug addicts who stole to support their habit, many prostitutes were believed to be runaways, and some offenders were homeless or suffered from mental illness. Even police officers complained that they were aware of no social service programs or agencies to which they could refer offenders they came across on their beats.

With funding from area business owners, further research and study were conducted. A new model court was proposed, one that would specifically focus on minor offenses, impose a broad array of sentencing alternatives, and also offer on-site social services for offenders. However, such a court would need significant funding and a place to conduct business. Again, area business owners pitched in—providing a building for the court's use and providing funds to pay for on-site social services. Judge Sandy Green, who had sat at the downtown courthouse for four years, was asked to preside over the new court. Brownsberg's administrative judge for the criminal courts selected Judge Green for the assignment based on her skill at dealing with the public and her willingness to "think outside of the box."

Despite overwhelming support for the new court among court administrators and local civic groups, there were a number of skeptics. For instance, some of Judge Green's colleagues on the bench

expressed concern. At a local judicial luncheon, Judge Green was approached by Judge Sarah Wallace, a judge in the centralized criminal court. Judge Wallace told Judge Green that the community court was already causing problems before it even opened. At sentencing hearings, defense attorneys were citing the planning of the community court as grounds that Judge Wallace should be providing social service-type sentences. In the alternative, they were arguing their cases should be put off to be handled in the community court. Judge Wallace told Judge Green she was concerned about the way in which the community court might impact the practices and proceedings in the centralized criminal in the future. Would there be two brands of justice in Brownsberg?

In addition, the public defender serving Brownsberg was cautious in his support of the new court. The defense bar feared defendants would be facing sanctions from the community court judge for cases that seldom would have been pursued at the centralized courthouse. They also felt that the possibility of different results in different courts based solely on arrest location was unfair and that the new court would further fragment an already complicated and overworked justice system. Despite these concerns, the court's commitment to providing services to low-level defendants made it appealing to many defense attorneys.

### COMMUNITY COURT MODEL

Judge Green's Community Court is very different from many other urban court complexes. The court has an inviting and accessible interior: clean, well-lit, and orderly. Entering the courthouse, visitors are greeted by court security staff and directed to the proper location. Inside the courtroom, television monitors display the status of cases on the day's calendar. Both the judge and the attorneys use computers in the courtroom to learn more about defendants with whom they are dealing.

The court is a misdemeanor arraignment facility which has the specific goal of helping to solve problems specific to the downtown area. All defendants charged with quality-of-life crimes and other low-level offenses in the downtown area are brought by police to the Community Court rather than the centralized court for their first appearance. In this way, these cases are not lost in the shuffle between more serious matters and move quickly from arrest to arraignment.

Prior to arraignment, defendants at the Community Court are interviewed by a Brownsberg's pre-trial agency as part of the regu-

lar bail recommendation process. For the purposes of the Community Court, the standard interview has been expanded to include background information on each defendant's drug use, housing situation, and health status. This self-reported information (which is collected on a voluntary basis) is added to the court's computer database so that Judge Green immediately knows about a defendant's prior criminal record, housing status, employment status, mental health issues, and current drug use.

Once community court defendants come before the judge, usually the same day as their arrest, community court defendants are extended a plea offer. Defendants who do not wish to plead guilty have their cases adjourned to the centralized court for further proceedings. Those who do accept the offer immediately proceed to sentencing. The speed with which these cases move from arrest to arraignment to plea to sentence helps to impress upon offenders that consequences do follow from their criminal behavior. Moreover, it reduces the risk of non-compliance on the part of sanctioned defendants, who begin their sentences soon after their arraignment rather than weeks later.

Sentences imposed by Judge Green are meant to meet the needs of both the defendant and the community. Towards this end, all crimes—even those that may have gone essentially unpunished before—receive some sanction. Defendants are almost never sent away with the sentence of "time served." During planning, statistics revealed that over one quarter of the defendants at the centralized court were sentenced to the time they had already spent in the lock-up awaiting arraignment; the community court imposed that sentence in less than one percent of its cases.

The judge has many different sentencing options at her disposal at the community court. Almost all defendants are required to perform community service in order to pay back the neighborhood they have harmed. These projects, supervised by a community service coordinator employed by the court, include graffiti removal, improvement of park gardens, or office assistance for local non-profit organizations. Because community service sentences commence quickly after a defendant's conviction, compliance rates are much higher than they were when such cases were handled at the centralized court.

A wide range of social services are also available under one roof at the community court, making it a gateway to assistance. For instance, as part of their sentences, many defendants are mandated to participate in short-term programs such as drug-treatment readi-

ness sessions. These readiness sessions introduce the idea of drug treatment to addicts who have committed offenses (criminal trespass, prostitution) too minor to warrant mandated long-term treatment, but who nonetheless are in need of help. Because these services are available on-site, social services-based sentences can also commence promptly. For defendants, being arrested becomes an opportunity to turn crisis into a second chance. Indeed, while they serve their sentences, court staff continue to engage defendants, encouraging them to take advantages of the array of services the court has to offer. As a result, many defendants—as many as 1 in 5—voluntarily return to the court after their cases are closed in order to access programs available and receive further services such as vocational counseling and GED classes.

The judge frequently tests new sentencing options and court staff monitor the effectiveness of existing sanctions. Moreover, Judge Green maintains constant and open communications with all of the parties—both courtroom and non-courtroom players—about the workings of the court. She often requests feedback from the offices of the public defender and the district attorney. The judge also meets with the court's social service staff to learn about newly available programs and new clinical thinking regarding the effects of drugs or mental illness. Perhaps most importantly, every month Judge Green convenes a panel of community members and police officers to hear about concerns and changes in the community.

#### ILLUSTRATION ONE

It is Thursday at 7:30 p.m. Judge Green sits at a table in her chambers. With her is the community advisory board, a group of ten people who are invited to represent various segments of the neighborhood, including community leaders, business representatives, and law enforcement representatives. Also present are a number of court personnel.

Nina Elkins, the president of a local block association, has been informing Judge Green about the increasing problem of prostitution on her street: "The corner of Park and Main has been awful lately—nothing but prostitutes, 'johns,' and noise. The same cars—filled with guys looking to buy sex—drive around and around all night long. They shout and honk their car horns until the early hours of the morning. I can't get any sleep. Everyone in our building is sick and tired of it."

Ms. Elkins explains that things were the same way a few years back, but quieted down over time. "We thought the problem went

away, but here it is again. I realize that a lot of the prostitutes are just teenagers and drug addicts. I kind of feel sorry for them. But you've got to see these guys who pick them up. Most of them are older men driving nice cars with out-of-state plates. I don't feel so bad for them. I mean they're really to blame. I bet they don't drive around causing a ruckus in their own neighborhood. They're probably perfectly upstanding citizens there."

Nora Walsh, a local parent, offers a similar account as well as her thoughts on how "johns" should be handled. "You know, in some places they use really out-of-the-ordinary sentences for defendants who are caught soliciting a prostitute—like printing their name in the newspaper or taking away their car." Laughing, she continues: "Maybe we should try something like sentencing 'johns' to having someone honk a car horn outside their window at three in the morning every night for a month. At least then they'd know what it was like to live here."

Although her suggestion was made in jest, Ms. Walsh's comments strike a chord with Judge Green. Judge Green has always struggled with determining what kind of sentence is most meaningful in solicitation cases. What kind of punishment would both meet the concerns of the community and be useful for the offender? Maybe confronting these defendants with the community impacts of their crimes wouldn't be such a bad idea. But what would such a sentence look like?

Police officers Paul Perry and Patricia Prince inform the advisory committee that their precinct has received an increased number of calls about the corner of Park and Main. Officer Prince tells the group: "I think we may need to conduct another undercover sweep at that intersection."

Towards the end of the meeting, representatives from a local merchants organization, Stan Erickson and Fred Alberts, report to the judge that downtown has been hit by a wave of vandalism. Both men complain that their storefronts have been spray-painted with graffiti in the last month. "The same person must have done all the stores in the area," Mr. Erickson explains. "About ten storefronts had the same thing written on them: a giant 'Y2K' in red paint." Mr. Alberts adds "It's just not fair. I know one guy who has just about had it. He's thinking about closing down his shop and moving to the suburbs."

Judge Green tells the business owners she will look into sending a community service team to the area to remove the graffiti. The men seem very grateful that the problem will be addressed in this

way. “Wow,” Mr. Erickson says, “That would be terrific. Let the group who made the mess clean it up for a change.”

### ILLUSTRATION TWO

“I thought we heard some really interesting things at the community advisory board meeting last night, didn’t you?” Judge Green asks the staff with whom she is meeting. It is Friday morning and all of the court personnel have come together for their weekly session with the judge. Amongst those present are Aaron Alston, the court’s community mediation expert, Byron Bradley, the community service coordinator, and Carrie Conroy, a clinical psychologist who works with the court, all of whom were also present for the community advisory board meeting.

Judge Green continues: “It sounds like the businesses have been hit pretty hard by vandals.”

Byron Bradley agrees with Judge Green and tells her the community garden project that he started with a group of defendants two weeks ago is just about finished. “I’ll be able to send a crew out to remove the graffiti starting tomorrow.”

Judge Green continues, “The prostitution in the area is really getting to people, too. I really wish there were some other solutions available for those kinds of cases. I think we have some good alternative sentences available for drug offenders—like our treatment readiness program—but not a whole lot for prostitutes and johns. Do you have any ideas?”

Carrie Conroy responds: “I used to teach a health education class at a university health clinic,” Carrie Conroy begins. “We used materials, which outlined the risks involved with unprotected sexual activity. I was thinking that the prostitutes might benefit from a similar class, but one that would really address the particular issues they face in their work. For instance, a number of the prostitutes I have dealt with think they are practicing safe sex because they use condoms with their clients, even though they have unprotected sex with their pimps. Maybe they could be sentenced to the class—which would dispel some of these myths—along with community service.”

Judge Green thanks Carrie and tells her she would use such a class as a sentence for prostitutes if it were available. Carrie Conroy agrees to put curriculum materials together as soon as possible.

“As for this issue of the ‘johns,’” Aaron Alston joins in, “I received some materials at a conference I attended in Washington D.C. that talked about restorative justice conferences—facilitated

conversations between offenders and victims. They say it helps offenders to realize that their acts have harmed the community, and it allows the community to play a role in the criminal justice process. A facilitator makes sure the whole thing is balanced and that all participants are given a chance to be heard. I thought it was an interesting concept and had been wondering what kind of cases might be appropriate for that kind of meeting.”

After a discussion of the pros and cons of such an approach, Aaron Alston tells the judge he will contact organizations using such conferences to learn more about what they are doing. “I think it would be a good idea to try as a new type of sanction for ‘johns’,” Aaron says. Judge Green agrees and encourages him to keep her informed.

### ILLUSTRATION THREE

It is the first Monday in June. Judge Green is on the bench handling new matters. The first case she calls is *State v. George Rojas*. Mr. Rojas is charged with defacing private property. As she reads through the complaint on the computer, Judge Green sees that Mr. Rojas was allegedly seen spraying the phrase “Y2K” on the side of a delivery truck. Judge Green immediately connects this defendant with Mr. Erickson’s report about the vandalism to his building two months before.

As a community court judge, Judge Green often sees the same defendants over and over. It also happens, from time to time, that she learns information from the community or police about an offender she later sees in court.

“Your honor, given that Mr. Rojas has already spent the night in jail, we would be willing to accept a plea to disorderly conduct and recommend a sentence of time served,” Assistant District Attorney Wanda Wright tells the judge.

Judge Green thinks about the government’s offer. The charge of disorderly conduct, a lesser offense than defacing private property, has a lower statutory maximum penalty. The sentencing recommendation made by the government is the standard offer made at Brownsberg’s centralized court to defendants who have no prior criminal record. However, it is an unusual recommendation for the Community Court, which typically sentences offenders to perform community restitution.

“Do you want to take a moment to re-think your offer, counselor?,” Judge Green asks. “I don’t see how time served does anything to pay back the community.”



Wright is quick to respond. “Judge, on second thought, we’d like to offer a plea to disorderly conduct and recommend a sentence of eight hours of community service, which I think will send a strong message to Mr. Rojas about the impact of his behavior.”

After conferring with his client, Mr. Rojas’s defense attorney accepts the offer. “Very well,” Judge Green announces and engages the defendant in the required plea colloquy. Mr. Rojas acknowledges the court’s power in this regard and admits that he has painted the term “Y2K” on the side of a delivery truck.

Before imposing sentence, Judge Smith reviews background information about Mr. Rojas on her computer screen. She sees he has no prior criminal record and lives with his parents in an apartment in the next town.

Judge Green admonishes Mr. Rojas: “Do you realize the extent to which graffiti harms this part of town? Business-owners cannot afford to keep cleaning up after people like you who decide they want to destroy property. If these businesses are driven out of downtown we all suffer—including people like you and your family who don’t live here. I am very tempted to hit you with a much harsher sentence than the one the government has recommended. But I will stick with the district attorney’s proposal—eight hours of community service—because according to your record this is your first offense. Mr. Rojas, I certainly hope that we don’t ever see you again, because if there is a next time you’ll be seeing jail time. I hope doing community service work to pay back the community makes you think twice before you commit another crime here.”

Later that day, Mr. Rojas is taken by the community service coordinator with a group of defendants to start his community service time. Transported in a van that says “Justice at Work” on the side and wearing orange jumpsuits, the defendants are delivered to the area of downtown where Mr. Rojas was arrested and required to paint over graffiti.

#### ILLUSTRATION FOUR

Since the last advisory board meeting, Aaron Alston, the court’s community mediation specialist, has worked to create the restorative justice sentencing option for “johns.” This sanction—which the court is calling a community impact panel—requires defendants convicted of solicitation to participate in a facilitated conversation with selected members of the community for two hours. Unlike other victim-offender panels, it is not voluntary. Unlike other restorative justice groups, the goal is not for the community

to fashion a sentence. The plan is to have three defendants and three community members take part in each meeting. All panel conversations would have certain parameters—the community would let the offenders know how they have affected the community; the offenders would be permitted to respond, to apologize, and to explain what draws people to commit crime in the area. And, each conversation would be facilitated by Mr. Alston to ensure that each party has an opportunity to be heard, the conversations are respectful, and they do not stray off point.

Recently, attorneys assigned to the Community Court met with Judge Green and court administrators to learn more about the new sanction. At the meeting, Judge Green suggested the prosecutor's office might offer the new sanction as part of its plea agreements; the office of the public defender was asked if it would keep an open mind and encourage clients to participate in the panel. The defense bar expressed concern that such sanctions were equivalent to public shaming and that defendants might make potentially damaging statements in the sessions. Judge Green assured defense counsel that the sessions would be private—only the participants and court staff would be present—and that the information disclosed in the conversations would not be used against the defendant by the court. Despite the judge's assurances, the defense bar did not whole-heartedly welcome the new sentencing option.

Today, Judge Green is handling the first solicitation case to reach the court after the creation of the community impact panel: *State v. Ronald Slip*. As Mr. Slip is brought out of the lock up, Judge Green reviews the information on her computer screen. According to the criminal complaint, Mr. Slip was arrested at the corner of Park and Main—the very area that community members talked about during the last advisory panel meeting—for soliciting sex for money from an undercover police officer.

“Your honor,” says the Assistant District Attorney assigned to the court, “If Mr. Slip pleads guilty to solicitation in this matter, we will not seek jail time. Rather, we would recommend that he participate in the new impact panel program that the Court has established.”

Judge Green knows that Mr. Slip, with no prior criminal record, would not be sentenced to jail time under any circumstance. It is likely that his defense attorney, Susan Jones, has already informed him of this. If Mr. Slip refuses the plea offer, his case would be adjourned to the centralized court. However, Ms. Jones knows that requesting an adjournment of the case to the centralized

docket for further proceedings would require Mr. Slip to make additional trips to court, particularly if he ultimately proceeds to trial. These trips would occur during business hours and would require time off from work for the defendant. Any failure to appear would result in the issuance of a warrant—and a stiffer sentence should Mr. Slip be re-arrested. Given her knowledge of these factors, Judge Green thinks it is likely this defendant will enter a guilty plea today in order to quickly put this matter behind him.

However, defense attorney Jones objects to the prosecutor's recommendation. "Your honor, I'm not sure I feel comfortable counseling my client about whether he should take part in this new experimental sentence being offered. I understand what it is, but there still seem to be a number of unknowns involved."

In response, Judge Green explains to Mr. Slip that the purpose of the impact panel is for him to learn, directly from members of the community, about the impact of his actions. Judge Green assures Mr. Slip that the court's mediation expert will be present to monitor the conversation and that what is said there will remain private. Judge Green then asks Mr. Slip's attorney to take a few moments to discuss the new offer with his client. After a few moments of whispering to his client, Mr. Slip's attorney turns to the bench: "Judge, Mr. Slip wishes to enter a plea of guilty at this time and will accept the government's offer. I have discussed the impact panel with Mr. Slip and he understands all that it entails."

Mr. Slip's plea is accepted by the judge and he is sentenced to participate in the first panel, which is scheduled for a Wednesday evening the following week. Judge Green knows which community members have been asked by court administrators to participate in the panel—Nina Elkins and Nora Walsh—the two individuals who were so vocal during the advisory group meeting about the impact of prostitution on the community.

Following the first impact panel session, the one in which Mr. Slip was ordered to attend, Judge Green reads the comment forms that were filled out by all of the participants—both defendants and community members. While some suggestions were made to improve the process, the comments were overwhelmingly positive. The community members felt that they had had a chance to participate in the justice process and voice their concerns in a meaningful way. Though it appears that Mr. Slip said little, he apologized for his behavior and acknowledged that the panel had been conducted as advertised.

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*In 1993, the country's first community court—the Midtown Community Court of New York City—opened its doors. The court was designed to go beyond the routine processing of low-level crimes and to help resolve problems that were specific to New York City's midtown area—including the high concentration of low-level quality of life crimes. According to independent evaluators, the Midtown Community court has reduced arrest to arraignment time and improved compliance with community service by 50%. Low-level crime in the neighborhood has dropped by as much as 63% in the case of prostitution. And focus groups with police, defendants, and residents revealed improved confidence in courts. These results have spurred other jurisdictions to follow Midtown's lead. Six community courts have already opened, and another two dozen are in the planning stages.*

## APPENDIX 3\*

CASE STUDY: WEST JACKSON DOMESTIC  
VIOLENCE COURT<sup>219</sup>

## CONTEXT

*The criminal justice system has long had difficulty in calibrating its response to domestic violence. Over the past 25 years, it has moved from a vision of domestic violence as primarily a private matter to increasing recognition that domestic violence is a criminal offense meriting traditional criminal justice responses. More recently, prosecutors and courts have experimented with approaches that acknowledge that domestic violence is intrinsically different from other criminal offenses without abandoning the recognition that domestic violence is first and foremost a criminal matter. These initiatives are a response to both increased public awareness about domestic violence and a significant growth in domestic violence cases.*

*According to the Justice Department's Bureau of Justice Statistics, each year in the United States there are an estimated 960,000 incidents of physical violence against a current or former spouse, boyfriend, or girlfriend,<sup>220</sup> and roughly 85% of these victims are women.<sup>221</sup> Approximately 30% of female homicide victims are killed by an intimate partner or former intimate partner. Though*

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\* EDITOR'S NOTE: This Case Study has been reprinted with permission from the Center for Court Innovation. The Case Study has undergone only minimal editing.

219. This case study is one of a set of case studies written by the Center for Court Innovation in 1999 as part of the briefing materials for a series of roundtables that brought together leading academics and practitioners to explore some of the ethical and legal challenges presented by problem-solving courts. These case studies were not intended to describe best—or even appropriate—practice in problem-solving courts. Instead, they were deliberately written to highlight possible tensions between problem-solving courts and traditional practice in the courts and to provoke conversation among roundtable participants. The case studies were written by a team that included: Greg Berman, John Feinblatt, Scott Schell, and Mae Quinn. The Center for Court Innovation would like to offer thanks to the following people who commented on earlier drafts of the case studies: Cait Clarke, Susan Knipps, Eric Lane, Roy Simon, and Michael Smith.

220. In some jurisdictions, intimate or domestic violence is defined more broadly to include same sex partnerships and non-physical (e.g., emotional and economic) abuse as well as physical violence. Measured with this definition, the number of domestic violence incidents per year would be larger.

221. Unless otherwise noted, the statistics in this “context” paragraph are taken from LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS FACTBOOK: VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OF FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998).

just one in five female victims who are injured by domestic violence seek professional medical treatment, approximately 40% of women visiting emergency rooms for injuries caused by intentional violence received those injuries from an intimate. The caseloads resulting from domestic violence offenses are large, even with *half of domestic violence incidents going unreported to the police. In 1998, the combined volume of felony and misdemeanor cases in New York City's Criminal Court exceeded 25,000—more than one out of five pending criminal cases.*<sup>222</sup>

### BACKGROUND

Judge Charles Henderson has been a criminal court judge in the city of West Jackson for almost a decade. He currently presides over its recently developed specialized domestic violence court.

Before taking the bench, Judge Henderson served as a prosecutor for over twenty years. During his tenure with the office of the district attorney, perhaps the most difficult cases he dealt with were those involving crimes of domestic or intimate violence.

Often, the first hurdle was getting the police department to take incidents of domestic violence seriously. Many officers who responded to domestic violence calls viewed these matters as private family disputes better resolved by the parties themselves than the criminal justice system. Officers untrained about the nature of domestic abuse and unaware of the grave dangers faced by complainants often handled such calls without making an arrest or providing assistance to the complainant. Indeed, in many instances persons accused of battering were simply told by police to cool off at a friend's house overnight or to take a walk around the block.

Even if an arrest was made, however, these cases presented many other concerns. For a variety of reasons, women who were abused frequently did not wish to press charges or testify against their batterers. Many feared retaliation by their partners and, particularly, the violence which frequently occurs as a result of attempts to separate. Others were economically dependent upon their partners, and worried that going forward with prosecution would leave them and their children destitute. Non-citizen victims sometimes sought to withdraw complaints because they were convinced they would be deported otherwise. As a result of these complexities, many criminal cases against batterers never went for-

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222. CRIMINAL COURT OF THE CITY OF NEW YORK, THREE YEAR OPERATIONAL PLAN, 2000-2001 THROUGH 2002-2003, at 5-12.

ward, either because of an explicit request by the victim to have the case dismissed or her failure to respond to a subpoena to testify at trial.

Even in cases that were prosecuted, the special dynamics of domestic violence often were not adequately taken into account. At sentencing hearings, unless a case involved serious physical harm to the victim, defendants were often sentenced to “straight” probation terms without any conditions. Because domestic violence cases were commonly viewed as private “family matters,” the sentences imposed were frequently lighter than those for ordinary assault upon a stranger—even though research reveals that the risk of continued victimization is far greater in a domestic violence case. In many instances, defendants who were out on bail often continued to harass their partners, frequently coercing them to withdraw their charges, or worse, continuing to physically harm them. Throughout the process, the complainant was essentially viewed as a mere witness needed to testify at trial. Children in the household were given virtually no consideration at all. Complainant safety was not of paramount concern; support services for victims were not being provided; defendants were not being adequately monitored; and justice, it seemed, was not being served.

After he took the bench, Judge Henderson continued to grapple with the difficulties presented by domestic violence. By that time, attitudes had begun to change about domestic abuse—a battered women’s shelter had opened in the area, the press often reported the stories and statistics relating to relationship violence, and domestic abuse finally began to be viewed by the public and by elected officials as a widespread social problem. Nonetheless, without changes to the system, judges had neither the time nor the resources to give domestic violence matters the attention they required. Time and again, judges were asked by prosecutors to dismiss the domestic violence cases on their dockets. Even Judge Henderson felt he had to close those cases the government moved to dismiss, despite his concerns about what might happen to the victim and her family afterward.

In 1995, however, a highly publicized tragedy in West Jackson forced everyone to rethink the way domestic violence was being handled, particularly by the court system. A defendant, charged with assaulting his girlfriend, returned home to kill her after being released without conditions pending trial. A review of the case revealed that the matter had been passed among the dockets of three judges and had been handled by two different lead prosecutors.

The public was outraged by the murder; it appeared that no one within the court system had taken responsibility for the case.

### PLANNING

In response, the state court's administrative judge created an advisory board to consider what the court could do to prevent future tragedies. The board consisted of judges, prosecutors, public defenders, police officials, probation officers, social service and mental health agencies, and others with expertise in the area of dealing with both abusers and victims of domestic violence. After many meetings, the advisory board produced a report recommending that West Jackson create its own specialized domestic violence court, following the lead of places like Quincy, Massachusetts.

The explicit goals of the court would be to ensure the safety and well-being of victims, and to hold defendant's accountable. To provide domestic violence victims the special services and protections that they previously lacked, it was suggested that all complainants be provided with victim advocates. These advocates would help guide complainants through the process, providing referrals and support, acting as a liaison to the justice system, and assisting in developing safety plans. Judges, it was proposed, should closely monitor defendants charged with acts of domestic violence who were not held pending trial. The advisory board also advocated greater coordination among the criminal justice players, including judges, police officers, the probation department, and others, such as battered women's shelters, in order to ensure effectiveness and consistency in response to domestic violence matters.

When the advisory board's report was released, the local defense bar's reaction was mostly negative. They were opposed to the creation of a specialized domestic violence court and argued that a court with the expressed goal of ensuring victim safety would undoubtedly infringe fundamental protections for defendants, including due process and the presumption of innocence. In particular, they expressed strong doubts about the planned pre-trial monitoring of all defendants and the form this supervision would take. A minority of the defense bar disagreed, arguing that active monitoring could help defendants avoid probation violations and that a judge specializing in domestic violence cases would be better equipped to consider the circumstances of battered women defendants.



West Jackson's prosecutors, on the other hand, were decidedly more sanguine, excited by the prospects of lower dismissal rates. Though some prosecutors worried about whether this new court would lessen their role in determining which cases were to be treated as domestic violence cases, they were largely supportive and undertook plans to create their own separate domestic violence unit.

The court system decided to authorize the creation of an experimental specialized court in West Jackson. Judge Charles Henderson was asked to preside over the new court, which would handle both felony and misdemeanor cases. After taking on that task, Judge Henderson attended training seminars on the effects of domestic violence, visited domestic violence shelters around the country, and read hundreds of articles and books relating to domestic abuse in order to bring himself up to speed on the issues. With funding from the federal government, a resource coordinator was hired to help Judge Henderson run the pilot program.

#### **DOMESTIC VIOLENCE COURT MODEL**

Defendants arrested in West Jackson for charges stemming from an alleged incident of domestic violence—which is defined by statute as any abusive act directed towards a current or former spouse, boyfriend, girlfriend or same sex partner—still make their first appearance before the ordinary presentment court for an arraignment and initial bail determination. Prosecutors from the district attorney's domestic violence unit as well as victim advocates meet with the complainant—either before the defendant's initial appearance, or as soon thereafter as possible. The purpose of this meeting is not only to gather information for the bail hearing and the prosecution of the case, but to create a framework for getting the victim needed services and for keeping the victim informed about the status of the case, including whether a defendant has been released from jail.

Both the victim advocate and the prosecutor work with the complainant to devise a safety plan for herself and her children, if she has any. Housing at the local battered women's shelter is arranged if necessary, or the complainant might be encouraged to stay with family or friends. Victim advocates sometimes refer complainants to social service providers or organizations that can provide legal assistance in related family law matters—such as divorce proceedings or child custody disputes. Together, these efforts seek to create a feeling of safety for complainants working within the system.

After the initial presentment, where bail or conditions of release are set, the case is transferred to Judge Henderson's specialized docket for all further proceedings. Judge Henderson reviews every defendant's pre-trial status. He makes sure that defendants who are out on their own recognizance have been ordered to stay away from the complainant under a criminal order of protection. Defendants who are not held pending trial are required to attend a batterers counseling program once a week as a means of keeping tabs on them.

Another important feature of the court, differentiating it from traditional criminal courts, is its use of a resource coordinator. The resource coordinator is a full-time staff person, who sits in the well of the courtroom next to the judge and is responsible for making sure that problems in need of attention do not fall through the cracks. The resource coordinator receives ongoing status reports from batterers programs, victim advocates, probation officers, police and others: Has the defendant been complying with conditions of release? Has the victim moved to a shelter? This information, in turn, is communicated to the judge.

When defendants appear before Judge Henderson for their status hearings, the resource coordinator is present. For pre-disposition defendants, Judge Henderson holds a status hearing every two to three weeks. Prior to the hearing, the resource coordinator will provide the judge with an update, informing him of issues in need of attention, such as whether it is alleged that the defendant has contacted the victim or failed to attend the batterers program. When an issue is raised, the judge gives the defendant an opportunity to be heard and then may decide to detain the defendant pending adjudication, if it appears the defendant has been non-compliant. For defendants who continue to have problems, Judge Henderson may revoke the defendant's conditions of release. When an emergency arises—such as a defendant making threats to the complainant—the resource coordinator is immediately informed, usually by the victim advocate, prosecutor, batterers program, or other involved party. The resource coordinator will then have the case placed on the calendar for a prompt hearing so that the judge may respond swiftly.

In addition, the resource coordinator is responsible for sharing information about changes in the status of the case with the relevant parties and agencies. For instance, the resource coordinator informs victim advocates, batterer's intervention programs, and others about changes in a defendant's court-ordered conditions of

release. When domestic violence cases involve persons who have cases pending in the matrimonial court, the resource coordinator makes certain to inform the matrimonial court judge about findings of guilt or any other relevant developments.

Given the intense monitoring of defendants, the communication facilitated by the resource coordinator, and the range of services made available to complainants, few cases—only about 4%—result in dismissal in Judge Henderson’s court. Moreover, in the new court, many fewer defendants violate their conditions of release or fail to appear. In fact, at the end of its first year in operation, the court had only a handful of outstanding warrants for defendants failing to appear.

Defendants may proceed to trial or plead guilty in the domestic violence court. In either event, Judge Henderson usually handles the cases from start to finish—over 100 cases are on his calendar at any given time. There are no “straight” probation sentences in the domestic violence court; defendants placed on probation must return to court once every two months for close monitoring in addition to visiting regularly with their probation officers.

#### ILLUSTRATION ONE

It is the first Monday of the month and Judge Henderson has just entered a meeting. It is a large group. In attendance are a number of West Jackson police officials, probation officers, court clerks, prosecutors, public defenders, intervention counselors for batterers, staff from the local domestic violence shelter, victim advocates, jail staff, and the domestic violence court’s resource coordinator, Barbara Taylor. Judge Henderson calls these meetings—which he calls domestic violence court partner sessions—on a monthly basis to facilitate formal communications between all of the entities who work together on domestic violence cases.

The topic of today’s meeting is probation’s role in overseeing sentenced defendants. Judge Henderson has chosen this topic because of a recent case involving a probation officer who failed to notify the court of a defendant who missed a scheduled visit. The incident did not come to the court’s attention until two weeks after the no-show occurred.

“I can’t stress enough the importance of all of us working closely on these cases if we are going to make the domestic violence court a success. You know, as well as I do, how these cases work. We have to stay on top of these cases,” Judge Henderson continues, “even after sentencing.”

The assistant director of the probation department tells Judge Henderson he is aware of his concerns. "I know that there was some failure to follow-through on the *Carlyle* case, but I have had a long conversation with my staff. I think everyone now recognizes they must inform the court at the earliest possible juncture of any failure on the part of the defendant to comply with the terms of probation."

One of the public defenders interrupts: "Judge Henderson, we all know why today's topic is the oversight of sentenced defendants. But I thought one of your ground rules is that there is to be no discussion here of individual cases."

Judge Henderson agrees, reminding the group that the purpose of the court partner meetings is limited to improving communication and considering general policies and practices of the court. Returning to the matter at hand, Judge Henderson suggests the office take further action: "Maybe it would make sense for Ms. Taylor to go over and introduce herself to the probation officers. That way they could match a face with her voice on the phone. Perhaps it would help your staff to feel more connected to what we are doing at the court."

The director of the local battered women's shelter, Tara West, suggests that it might also be useful for her organization to provide a day-long training for probation officers. "I know that we came out to do a training on the dynamics of domestic violence when the court first opened, but it's been over a year. I bet there are a number of new officers who haven't been trained, not to mention some of the older officers who could benefit from a refresher course."

Police precinct captain Thomas Frederick tells the group about a training conducted for new officers in his precinct. "It really opened the eyes of a lot of those guys," the captain tells the group. "All of us should make sure new staff are properly trained to handle domestic violence cases."

Judge Henderson tells the probation department's representative that he would like them to accept Ms. West's offer.

After the meeting, the probation department follows through on both suggestions—inviting Ms. Taylor out to the office and requiring its officers to undergo a domestic violence training each year.

### ILLUSTRATION TWO

Each year, the women's center at the state college hosts a conference on issues relating to domestic violence. This year they have invited Judge Henderson and asked him to speak about the

role of the judiciary in deterring violence against intimates. Judge Henderson's panel, billed as "The Government Response to Domestic Violence," includes an advocate from a victim's group, the chief of police, and a local prosecutor. During his ten-minute presentation, Judge Henderson explains the workings of the West Jackson specialized domestic violence court and shares his thoughts with the group on the need for meaningful judicial responses in domestic violence matters:

"In the past, our society viewed domestic violence as a private matter," Judge Henderson explains. "Problems between husbands and wives, boyfriends and girlfriends, and same-sex partners were considered outside of the law. Luckily, times have changed and courts all over the country have finally begun to work cooperatively with police, prosecutors, and battered women's advocacy organizations to protect victims, ensure their safety, and hold abusers accountable for their actions." During the question and answer period which follows, a female student talks about the fear and anger she felt at the time of the highly-publicized 1995 domestic violence murder in West Jackson. Judge Henderson responds by explaining that his domestic violence was created to address her concerns.

The following week, Judge Henderson receives a copy of the college newspaper. On the front page is an article about the conference he attended along with a photograph taken during his presentation. The caption under the photograph states: "Judge Henderson stands up for victims of domestic violence."

### ILLUSTRATION THREE

Judge Henderson calls the matter *State v. Victor Chin*. Mr. Chin is accused of assaulting his girlfriend, Wanda Smith. At the time of his arrest, bail was set at \$10,000. Mr. Chin was unable to post the money bond to make bail, and his attorney asked for a hearing before Judge Henderson to request a reduction in the bail amount.

At the hearing, Assistant District Attorney George Tyler indicates that the State will agree to a lower bail amount, if the court imposes a curfew on Mr. Chin and requires that, while he is out on bail, Mr. Chin attend an intervention program for batterers. "Your honor, this is a case with strong evidence. Last Saturday night, in the parking lot of a popular West Jackson bar, two witnesses clearly saw Mr. Chin first shove Ms. Smith up against a car, and then pull her into the car by her hair. Clearly, this is a defendant who needs close supervision."

The defense counsel argues that Mr. Chin has no prior record of domestic violence and that he is being punished without being found guilty. “Your honor, once Mr. Chin is forced to enter a batterer’s intervention program, his reputation will be seriously harmed. The program will interfere with his work and could jeopardize his job. If the allegations in this case involved strangers, you would not be ordering any kind of condition of release—let alone a batterer’s program. There is no reason for such a requirement to be imposed in this matter. This is an isolated incident. My client has never been accused of any other crime.”

Judge Henderson responds that this case isn’t about strangers, it’s about domestic violence—which presents a host of different issues from ordinary assault cases. “So, while a defendant is out on bail in my court, he will be taking part in a program.”

Speaking directly to Mr. Chin, Judge Henderson warns: “Sir, let me explain my order to you. Until this order is terminated, you are subject to a curfew, requiring that you return to your home by 9 o’clock each night, and you also must attend a batterer’s intervention program. The program meets each week. I am going to be watching your progress closely. If you fail to attend, if you don’t follow the program’s rules, if you don’t comply with this order in any way, you will find yourself back here answering to me. Is all of this clear?”

Upset, Mr. Chin asks Judge Henderson why he is being ordered to go to a batterer’s program. He tells the judge that he is a stable, working man who is innocent of the charges against him, and that he does not need to be monitored. Mr. Chin goes on to say that, since he is not a batterer, he doesn’t see how the program will change anything.

Since being appointed to the domestic violence court Judge Henderson has read a number of studies regarding batterer’s intervention programs. Some indicate that they are successful in changing the behaviors of abusers; others are less conclusive. Regardless, Judge Henderson knows that sending defendants to batterer’s programs enables him to keep tabs on their whereabouts.

Accordingly, Judge Henderson tells Mr. Chin: “I’m not sending you to this program for your benefit—it’s for the benefit of Ms. Smith and the people of West Jackson. It doesn’t matter to me whether you like it, or what you say there. The point is, you’ve been charged with a serious crime, and I need to keep an eye on you. While you are awaiting trial, it is my job to make sure I know what you are doing, when, and how. As for your guilt or inno-

cence, you'll have your day in court to present a defense, if you so choose."

Over the next few months, the court monitors Mr. Chin's behavior. Mr. Chin returns to court once every two weeks, where the resource coordinator provides status reports to the court about his compliance with his conditions of release. And, on a few occasions, Judge Henderson calls Mr. Chin at his home, in the evening, to check whether he is obeying the curfew imposed as a condition of his release.

At the end of his third month in the domestic violence court, following a jury trial, Mr. Chin is acquitted of the charges against him.

#### ILLUSTRATION FOUR

Joseph and Maria Farrell have been married for twenty-five years. After a series of bitter fights, followed by hopeful reconciliations—a pattern which stretched out over most of the past year—Mrs. Farrell decided to leave her husband and seek a divorce. She moved in with her sister, Hannah Cunningham, and told Mr. Farrell that until he heard from her, she wanted no contact with him either in person or by the phone. She explained that she needed to move on with her life, and that she did not want to repeat the terrible arguments they had been having.

Two weeks after their separation, Mr. Farrell went to Ms. Cunningham's home to talk to Mrs. Farrell about reconciling and having her return to their home. Their conversation quickly turned into an argument, growing increasingly heated. Mrs. Farrell, scared by her husband's behavior, closed herself in a bedroom and barricaded the door. Using a large kitchen knife, Mr. Farrell attempted to stab through the door and force his way into the room. The police, who had been called by Mrs. Farrell, arrived before Mr. Farrell was able to enter the bedroom. They disarmed Mr. Farrell and arrested him.

Following his arrest, Mr. Farrell was arraigned at the downtown arraignment court, where he was charged with criminal possession of a weapon and aggravated assault. Mr. Farrell, who had no prior criminal history, was able to post the money bond needed to make bail. Before releasing Mr. Farrell, the arraignment court judge routed the case to Judge Henderson's domestic violence court and imposed a standard order of protection, barring Mr. Farrell from having any contact with his wife. The order would remain in effect until Mr. Farrell appeared before Judge Henderson.

At the first status hearing in Judge Henderson's court, the assistant district attorney tells the judge that the arraignment court's order of protection has expired and asks Judge Henderson for a new order: "Your honor, I'm sure you'll agree, given the potentially life-threatening nature of Mr. Farrell's attack on his wife, that an order of protection barring any contact is essential in this case. Mr. Farrell is accused of committing a terribly violent crime."

Mr. Farrell's attorney, Max McGuire, asks to be heard and informs the court that since the evening of the incident, Mr. and Mrs. Farrell have decided to enroll in marriage counseling sessions with a highly regarded social worker and that they are committed to repairing their marriage. "Your honor, I have spoken to Mrs. Farrell by phone. She has indicated that she wants to pursue these counseling sessions with her husband."

According to Mr. McGuire, the unfortunate incident at Ms. Cunningham's house was a low point for the Farrells which has spurred them to take a fresh look at their problems. "Judge Henderson, given the Farrells' wishes, it would be a mistake for this court to stand in the way of their efforts to preserve their marriage. Under these circumstances, a no-contact order of protection simply makes no sense. In fact, the Farrell's actions—their recent conversations leading to their decision to go to counseling—already have violated the arraignment court's no-contact order. I ask the court to modify the order requested by the assistant district attorney, so that it allows Mr. and Mrs. Farrell to attend marriage counseling sessions and to speak with each other as necessary to arrange these meetings."

Mrs. Farrell is not present in the courtroom. Judge Henderson asks Barbara Taylor, the resource coordinator, whether she has any information regarding Mrs. Farrell's wishes with respect to the counseling sessions. Ms. Taylor tells the judge that she contacted Mrs. Farrell's victim advocate, but, because of the newness of the case, the victim advocate had not yet had an opportunity to speak with Mrs. Farrell. Ms. Taylor is unable to confirm whether Mrs. Farrell has had a change of heart.

Judge Henderson addresses the defendant: "I have heard the arguments made on your behalf by Mr. McGuire. But without being certain of Mrs. Farrell's wishes, I simply cannot allow you to have contact with her. My concern for her safety, given your past actions, is too great. As a result, I am issuing an order of protection prohibiting you from having any contact with your wife. We will schedule another hearing within two weeks to consider again



whether this order should be modified to allow you to go to counseling sessions. Your efforts to save your marriage will have to wait.” Weighing heavily on Judge Henderson’s mind was the belief, based on his experience with these cases, that counseling rarely works when violence is the issue.

Judge Henderson continues: “Mr. Farrell, I want to be very clear about this order of protection. It is my order. You are to have no contact at all with your wife. You cannot see her in person. You cannot talk to her on the phone. If she calls you, you are not to speak with her. If she asks to see you, you are not to meet with her. Do you understand, Mr. Farrell?”

Mr. Farrell tells the judge that he understands. Judge Henderson then asks the assistant district attorney and Mr. McGuire to approach the bench. He schedules a hearing in two weeks and directs Ms. Taylor to work with the victim advocate so that Mrs. Farrell is quickly informed about the order of protection. Back on the record, Judge Henderson ends the hearing, saying, “Ms. Taylor, I want to see a full report from the victim advocate regarding Mrs. Farrell’s wishes before the next status hearing two weeks from now.”

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*Since 1987, when the first domestic violence court opened its doors in Quincy, Massachusetts, state courts across the country have begun to rethink the way they handle domestic violence cases, creating specialized domestic violence courts of their own. These experiments have been driven by several forces, including increases in domestic violence cases, judicial frustration with traditional responses, and public pressure. Domestic violence courts are still a new phenomenon; as of yet, no one has taken a comprehensive look at their impacts. Still, preliminary research suggests they are making a difference, reducing dismissal and warrant rates, and providing improved services to victims.*