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**HOW DOES THE COMMUNITY FEEL ABOUT
PROBLEM-SOLVING COURTS?**

PANELISTS:

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Michele Bertran*Superior Court of New Jersey*

My title is ombudsman. I am the ombudsman for the Superior Court of New Jersey, Essex Vicinage, and I am going to talk to you a little bit about the ombudsman program, and the community's response to it.

But before I do that, I want you to do a little bit of work this afternoon, and I know it's the last panel, but I'm not going to make you work too hard, just a little bit. You're going to exercise a very old method of technology, and that's your imagination.

I want you to accompany me, if you will, on a virtual tour. Now, to do this you're going to have to close your eyes. Some of you may be comfortable with that, some of you may not. Those of you who are not, just peek at your neighbors while they do it. I'm checking, too.

First of all, imagine that you have a legal problem. The issue is something very, very dear to you. Get out of your car in front of a courthouse, one that you've never been to before. What are you looking for? What do you hope to see? What are you thinking about?

Walk in the door. What do you see? How do you find your destination; courtroom, office, or special program? How does the courthouse look? How does it feel? You have questions. You're worried. Who answers them? What information do they give you?

How does the staff treat you? What do you hope will happen in court? Who helps you if you are lost, confused, do not speak English, have a disability or are distraught?

What do you expect to find if you have been mistreated, feel you have been mistreated, think you have been discriminated against or wish to complain? What courthouse features help you to feel safe, respected, fairly treated, and well-served?

Open your eyes. Come back. Keep that mental picture in mind as I tell you about the ombudsman program in the Superior Court of New Jersey, Essex Vicinage.

Our court sits in Newark, New Jersey, the state's largest city. It has original jurisdiction in criminal, civil, and family cases. We handle over 100,000 cases annually with sixty-two judges and close to 1200 court staff, including an administrative staff of seventy.

The Office of the Ombudsman, located in the courthouse, offers three kinds of services: public information, where we try to inform the public and prevent problems before they start—hence, a pre-

ventive model; community relations, including a court tour program, speakers bureau, and special events designed to educate the public about the court and take judges and court staff into the community to learn about the public's concerns, a reciprocal educational model; and lastly, we offer citizen assistance. That is to say, when a court user feels aggrieved and wants to complain, and this is often, as you can well imagine, we listen, we investigate, we resolve, and we work to improve.

This program as it relates to the paradigm under discussion here today is not that of problem-solving court, so you can well imagine, when I received the invitation to come and speak, I thought, Why me? And that was before I knew who my distinguished co-panelists were going to be. But the office is not a problem-solving court, but it is a problem-solver in the court.

I will tell you how the community has responded, but first I want to give you a little history about the program. The recommendation for an ombudsman grew out of the groundswell of several sources. First the Supreme Court Committee on Women and secondly the Supreme Court Committee on Minority Concerns made this recommendation, and they made the recommendation on the basis of a series of town hall meetings that were held around the state in the early 1990s.

The meetings were held to determine public opinion about the courts, and the results were not surprising. They were very much in line with other surveys that you may be familiar with, surveys, for example, conducted by the National Center for State Courts. The public made its opinion very clear.

First, the courts seemed shrouded in a tangle of archaic rules and procedures and the mystique and befuddlement of legalese, and secondly, the public made clear that the shroud of secrecy and mystique seems to protect courts and their personnel from complaints about mistreatment or discrimination.

In response, the sensible recommendation emerged: establish an office to provide information and redress grievances, and hence, the Office of the Ombudsman. This recommendation was made to the Supreme Court and adopted by it in 1992.

In the ten-year journey since the recommendation was adopted, four of the fifteen judicial vicinages—New Jersey is a unified court system, and its twenty-one counties have sixteen judicial vicinages—in the ten years since the recommendation was made, four vicinages have adopted the program.

In New Jersey, we have argued about everything, starting with the name, which will not surprise you when it comes to courts and court planning. People have objected to the gender-specific term “ombudsman,” but it is of Swedish origin; it means citizen representative, and we have maintained it. Some people have suggested that perhaps “ombuddy” is a little better than ombudsman.

(Laughter.)

I didn't like that one, either.

We have argued about the name, the scope of authority, and the responsibilities. We have done all of this in an attempt to break new ground and develop the features of an ombudsman for the courts, and I have to tell you that the debate continues.

We have been helped in this process by other groundbreaking innovations in jurisprudence, such as problem-solving courts. These forward-thinking models are contributing to the realization of an accessible, responsive, and de-mystified court system.

Now, of course, this is not without its problems, as we can see from the symposium. There is much debate to still be had.

Now, let's turn to the community's response. It will not surprise you, I don't think, that initially members of the community are genuinely perplexed. You're here to help me? What a novel idea. I mean, people are perplexed and pleasantly surprised that the court has an office to help them.

Let me describe it to you. It's an office located on the first floor of our main building. It is a welcoming environment, a safe environment, and a comfortable environment. It is staffed with community-relations liaisons who are attentive, who immediately offer assistance to court visitors, and who attend to their needs immediately—again a novel idea sometimes in our system.

So how has the community responded? What do they say? Well, we've tracked this a bit, and the most frequent response is, “Thank you, God.” Other remarks are, “Why didn't we have this sooner? Does every court have one? If not, they should.”

Now, why is the community responding in this way? Because they do not expect courts and court staff to help.

We have been humbled by the extent to which recipients of our services have gone to demonstrate their gratitude. For example, we frequently say we cannot accept gifts, and yet we get flowers and balloons and things delivered thanking us for what is to be expected in our system.

Everyone who walks into the courthouse has a problem. I think certainly that has been made clear here in this symposium, and I do

not want to repeat the obvious, but everyone who walks into the courthouse has a problem. People come to the courthouse expecting to find help for their problems. The system can be formidable if people are unfamiliar with the court system, are lost, confused, have difficulty articulating what they need in a language that we immediately recognize.

Although we understood the importance of this program when we started, we could not have known how much the community would welcome it. We could not have understood how much they needed it. The public was clear from the outset. The public, the community, continues to be very clear about its support for these kinds of programs. And they have been very generous to us court problem-solvers.

Programs like the ombudsman send a strong message about the system. They send a strong message to us about the system and a message to the public of responsiveness and accountability, a message of respect for people's struggles and compassion for their suffering.

Again, everyone who comes to the courthouse has a problem. I hope that you will remember your thoughts and your feelings as you imagined yourselves with legal problems, you who are probably in the best position to deal with your own kinds of legal problems. But you are a part of a community, not separate from it. You are part of the community that the court is obligated to serve.

I know you care about this and that's why you're here. We who toil in the system are public servants. If we want to serve well, we must, as some commentators have noted, fix what is broken. The public's incredulity tells us that we have miles to go before we rest. Their support tells us that we can make innovative jurisprudence a reality.

Mary Barr

Conexions

My name is Mary Barr. I am executive director of Conexions, and we are very new, so you haven't heard of us yet, but you will.

For five years, I've been working in prisons and jails, and I guess that's the unique perspective that I bring to the table today. What Conexions wants to do, though, is provide services outside of prisons. Right now we go into Rikers twice a week, but we go to state and federal prisons about once a month, and we give all kinds of services; legal, self-esteem, substance abuse, anger management, and other kinds of workshops. But again, we need this continuity of service outside and—hint, hint—we need all the help we can get.

I studied a lot of the studies that the people that were on these panels for the past two days put out, and I was really glad to be part of this panel because of that.

However, I guess I have come to be known as somebody who mixes statistics with personal experience, and I was really at a loss of what to talk about today, because for the past two days everybody has said it twenty times better than I could.

So first I want to make some disclaimers. I applaud drug courts and I applaud problem-solving courts because for a long time the justice system did the same thing expecting different results, and finally we are doing something different, and it's an improvement. However, I am going to talk about some improvements that need to be made to the improvements.

Also, I want to say that I don't encourage drug use. As a recovering addict, I am going to say to you, Please don't use drugs. Don't drink. Don't smoke cigarettes. Brush your teeth after every meal and eat all your vegetables.

However, you're going to do what it is you're going to do, and there is very little I can do about it, unfortunately.

I would really like to expand on the racial issue. Eighty-five percent of the people incarcerated across the country are minorities, people of color, Hispanics, Native Americans, et cetera. In New York that number is actually usually a little bit higher, and I am going to talk about New York because that is more what I know about, but we are a really good barometer of the rest of the country. Again, that is sort of the case unfortunately.

I was really proud to start writing articles where my personal history wasn't included, and then I spoke to a mentor of mine, who writes a lot of studies on the impression of African-Americans, es-

pecially African-American women in the system, and she said to me, "Mary, be careful, because there's their numbers, there's your numbers, and there's the truth." So what I'm going to discuss today is the truth as I know it to be.

I have named a few of my accomplishments, but aside from that, I started a program like I want to start here. I started one in the Former Soviet Union, and in less than two weeks, I got every organization in the Former Soviet Union, the chairman of the Ukraine, the chairman of prisons, all under one roof and agreed to work together to start a transitional program for people coming out of prison, especially substance abusers.

Trying to get that done here, trying to get everybody under one roof on any day, is really difficult.

So now that I've told you a few of my accomplishments, I want you to know that I didn't accomplish them because of the system. I accomplished them in spite of the system.

We've talked about relationships between judges and clients here in the past two days and a lot of other things. Well, that's nice to know. I was in front of judges in New York City forty-five times. In those forty-five appearances, I was never once offered an alternative to incarceration. The only relationship I had with any judges that I can remember were three judges.

The first time I was before a judge, I was scared to death. I was terrified. I had been arrested. I was so scared, because when you get arrested, it's not just like, you know, somebody comes up and says, "Okay, ma'am, could you please get in the car; you're under arrest." Three squad cars and a van, eight police officers jumping out, "Get against the wall, get against the wall." I peed myself, and I went in front of the judge like that, but not just then. I spent forty-eight hours in a holding cell before the judge saw me, forty-eight hours on the floor with no shower, no comb, no toothbrush, and the judge saw me like that.

I am surprised that not everybody that goes in front of a judge after time in a holding gets sentenced. I mean, if I saw these people, I would be so scared, I would say, "Put them away, please." So that's one of the problems that the justice system has, just that we have to wait and we have to be in those kinds of environments before the judge even gets to see us.

I also met my attorneys five minutes before I met the judge, and they met me. The first time I went before a judge, again I was scared, and the judge looked over the bench and said to me, "How do you plead?" I said, "Not guilty," and the judge called the de-

fender and the prosecutor and said, "Do you have bail money?" And I said no. And they said, "Do you realize that if you don't have bail money, you'll sit in jail for ninety days before your trial? However, if you plead guilty, we'll let you go home right now." Guess what I pled? I pled guilty. I wanted to go home and I got to go home. However, now I had a record.

Again, we need a really long panel for me to tell you everything that happened. But before we have sentencing, we have arrest. Before arrest, we have legislation. Before legislation, we have to put these laws into effect, and that takes public opinion. So it is really more than we can cover in this conference. It's a whole octopus that has tentacles that has tentacles that has tentacles, and we really have to start over, from social services to probation to parole to the justice system. Really, I am very encouraged by drug courts, and I am optimistic that we'll get them to work.

Sometimes I dislike doing my story, but there are so many aspects of it that really show what is wrong with the justice system.

I was never once seen by a social worker. When I first went to ask for help—and I did realize I had a problem before it got so bad—I went to a social worker with my two kids, and I said, "You know, I am not hurting my kids and they're not starving, but I don't think I'm a real good mother."

She said to me, "Well, are you on my caseload?" And I said, "No, I'm not on welfare," and she said, "Well, what do you want me to do?" I said, "I don't know. I mean, where can I go?"

She called her supervisor. Her supervisor came to me. I gave them my information, and at 2:00 in the morning there was a knock on my door and it was Child Services, and they took my children.

When I tell people—today I work with women and men in jail and prison, and when I tell them that story, they look at me like I'm crazy. "You did what? What are you, nuts?" And I was like, "Well, I thought that was what you were supposed to do. You wanted help, you went to somebody who could help you." And the system is really not geared for that anymore, and we keep separating the needs of the parent from the needs of the children.

Yes, I don't want children to get hurt, but look how children are getting hurt by the separation, which is one of the things we brought up yesterday, that we need treatment modalities that take women and their children so we can heal together.

Not only that, though. It only costs \$26,000 for a woman and two children for a year where the children get psychological counseling, the mother gets psychological counseling, job skills, GED,

three hots and a cot; whereas my last incarceration alone cost taxpayers almost \$65,000, and I got no services. I didn't even get a toothbrush. So we have to look at how we're spending our tax dollars and how more effectively to rotate those funds, get the police to catch the real bad guys who are out there.

Violent crime is really being put on the back burner for the easy arrest. I was easy. I had no money, I had no lawyer, I had no bail, I pled guilty every time. I was guilty maybe seventeen out of the forty-five times, but I pled guilty every time because who would you believe? I mean, you know, looking at me today, maybe try to imagine somebody who weighed ninety-seven pounds, who didn't bathe for a couple of days, who didn't sleep for two weeks.

If I had time I would explain addiction to you, and then I would get rich, too, because if I could explain it, we could cure it. It's a disease of definite low self-esteem. Eighty percent of the women that we have incarcerated are addicted or using some sort of substance. They have been physically and sexually abused.

Now, why isn't jail the answer? Besides the fact that there aren't services in prisons and jails and this really isn't an environment where everybody has warm fuzzies for the person incarcerated, the first time I was incarcerated, I was raped by a corrections officer. Around the fourth or fifth time I was incarcerated, I was beaten up by three women for six cigarettes.

One of the other times I was incarcerated, I got lice. I lived in the street for three and a half years and didn't get lice, but I got lice while I was incarcerated. I also got chickenpox, and I was released back into your city with chickenpox.

We are not addressing any of these health issues, and we have the money. We're spending that kind of money that we could address those issues in a much better way, and I really appreciate the fact that you guys are here. And though I dislike telling my story because sometimes I am not invited to afternoon tea afterwards, I tell my story because I want you to know what I know, that eighty-five percent of the women incarcerated are just like me, only they're African-American or Hispanic. If a guard said, "Yo, white girl," I would turn around because I knew they were talking to me.

But this isn't just an issue of race. It's an issue of really finances and how we look at, you know, the frat boys that snort coke in the bathroom and the guys on Wall Street that get coke delivered with their pizza and people that don't have that kind of money—not money for fines, not money for private treatment—and nobody cares. Nobody is there to back them up. Nobody came to the pre-

cinct for me, nobody came to court for me, and these other people have people to fight for them. I didn't know well enough to fight for myself.

Again, addiction—I thought I deserved all that stuff. I thought, Well, yeah, I'm an addict; that's what I get. That's what I get. And I kept saying that to myself, and that's what the system said to me, too. "See, that's what you get, that's what you get." They really instilled in me all the negative messages I was already giving myself.

Another reason I like problem-solving courts is because we're starting to look at people a little differently. It could be you. It really could. I never thought it could be me, but it turned out to be me. And I never thought I would talk a lot about it after it was over.

Every day is a struggle, but it's a good struggle. Today it's more of a challenge than a struggle, and I take one day at a time, and that is what recovery is about. I've been clean for six years. I have today, because yesterday is gone and tomorrow isn't promised to anyone.

But I'll tell you my story and that I represent these other women because they are just like me, and just like me, they're worth it.

Charles Grodin*60 Minutes II*

There are so many horror stories, and you've probably heard them all, and Jan Warren, sitting here in the first row, has also lived one. Jan was living with a boyfriend who was a drug dealer. She was not a drug dealer, but she got caught in a police sting operation. Was it your cousin who asked if you could get some drugs? She wanted to get away from this relationship, so she transported the drugs—you wanted to move to the West Coast, right? And it was a sting operation, not on a drug dealer, and she served twelve years.

Elaine Bartlett is another woman who served seventeen years. Elaine, an African-American woman, was a welfare mother of four children. She was working in a beauty parlor off the books, as she puts it. Some Caucasian fellow was hanging around the beauty parlor and one day approached her and said she could make, it was either \$2000 or \$2500 to carry some cocaine to upstate New York.

It was another police sting, and she was arrested, didn't really know that she could go to prison and be there for seventeen years, during which time her youngest son took to the streets. He is now in prison. Her oldest son got a basketball scholarship, and he had to come home after six months to take care of the other kids because Elaine's mother was sick. The families were devastated by this.

Arlene Overg was taking orders for a drug dealer. She was a drug addict. She was addicted to cocaine, and Arlene served eleven years.

And Lea Bundy served, I believe it was—was it nine or ten years, Lea? Nine.

The first three women got out, were granted clemency by Governor Pataki. I had a cable show at the time and went up to the prison and interviewed these women and got the video up to Albany, went up and gave a luncheon up there and showed the faces of the women that were incarcerated, helped to put a face on it, and three of the four women were granted clemency.

The fourth, Lea Bundy, was not granted clemency. When I asked the senators that I had befriended why not, they said, well, she hadn't done enough time. Now, what had Lea done that nine years wasn't enough time?

Lea was also dating a drug dealer and was caught in a police raid in the apartment and went to prison for nine years. All of these

women were mothers of small children, so you can just imagine what that did to the families.

That's the Rockefeller drug laws. They really helped, because then, just to make sure and maybe help the whole situation, I started interviewing the children of these women. I then sent the video of the children, so the video and putting faces on the names and the numbers, absolutely helps. So we are always waiting for a revision of the Rockefeller drug laws.

In trying to stay active in this, not having a cable show anymore but now working for CBS News, one of the good things about working for CBS is it does give you access, so if you call up people, you get to go and talk to them. I have been able to become friends with the chief counsel for Governor Pataki and the chief counsel for Speaker Silver and an acquaintance with the chief counsel for the Senate leader, Joe Bruno, and a man named Ken Riddett. These people are going to meet in the next month or so to once again talk about doing something about the Rockefeller drug laws.

In talking to them all separately, I am not all that optimistic, because it really comes down to—and here's where the courts come in, it really comes down to who has the discretion when someone comes before a judge of whether they go into a drug court or whether they just go to prison. The prosecutors want that discretion, the judges want that discretion, and neither of them are going to get it, so the chances are the law isn't going to be revised unless they can come to some meeting.

Unless they can come to some agreement to share responsibility between the judges and the prosecutors, I am not all that optimistic that we are going to get a revision of the Rockefeller drug laws. You could get a revision on the A1, but that is going to represent 600 people and leave twenty-some thousand with nothing happening. So the Democrats' position is that they are not going to do that because once they deal with it, it's over, and they're not going to deal with it until or unless another governor is there, which at this point doesn't seem likely.

I think, as I have been told, it is something like twenty-five percent, something like that, of the voting community is either African-American or Hispanic, and that is bringing some pressure to get this law changed, which most people with any common sense know is just horrible.

That's where it is right now in terms of the Rockefeller drug laws, which is the only thing I am even remotely qualified to speak about. But in dealing with all of this for the last several years, I put

some thoughts down on paper that I just want to share with you today in hopes that somebody will carry something forward, just some obvious things that jump out at you when you look at the justice system.

I never met anyone in prison, particularly these people in the prison because of Rockefeller, who had even heard of the Rockefeller drug laws; they had no idea what could happen if they did take a package to somebody. They also had no idea that it might be a police sting. They didn't really realize what they were getting to, so there is no education on this. Maybe there is some, but it's sure not sufficient. Young people are probably going to fall into that same trap because they don't really know what they're walking into.

So whether we change the law or not, we should start letting people know what they're in for if they want to transport some drugs, two ounces, if they want to do that, that they could go to prison for fifteen years to life.

Obviously, we have to find some middle ground between mandatory sentences and too-lenient judges and make that determination should not be about how much the package weighs. So if a real drug dealer has an ounce, then he is not going to get much of a sentence, and if some messenger who has never anything to do with drugs and it's the first time they've done this—and all these women, by the way, were first-time offenders with no prior record of any kind. It cannot be about weight; it has to be about who the person is and what they were doing.

I don't think that the state should be involved in sting operations on ordinary citizens. Do you want to put out a sting operation on a welfare mother? Everybody knows that it's unusual for anybody to withstand money, bribery, do something for me. Most of us are vulnerable to that type of thing. If you're a welfare mother and someone says, "Here's a couple of thousand dollars," and your children are living in a tenement in Harlem, you're going to probably take the \$2000 and be scared to death. But I don't understand why the state is putting out sting operations on welfare mothers, instead of drug dealers. For drug dealers, I understand it.

Obviously, any first-time offender who has a drug problem should go to a drug court.

While I spent some time in Bedford Hills, I was struck at how many mentally ill people are in the prisons. Most of you know all of this, but it continues on. These prisons do not have the proper treatment for those kinds of problems.

At the same time, we want to be careful. We're always reading in the paper how really dangerous people are released. So we don't seem to know who should be in prison and who should not be in prison.

It's wonderful to be here and we can all feel good that we're here because it makes us feel good about ourselves. Certainly that is why I am here; I want to feel good about myself that I am doing something. But sometimes I ask myself, what is all this? Is this about feeling good about yourself or does it matter if I am here or if you are here? What difference does it make? We feel like we spend our time in a good way so that's a good feeling. But does it really matter if this seminar never took place at all? That's a question I ask myself about a lot of issues.

But as long as we're here, it seems to me that the courts could be more vocal and get together with the prosecutors and say, "We've got to come to some compromise where neither one of us have the last word." We've got to do this because it's even an unusual prosecutor that doesn't understand that something is desperately wrong.

I would say, if I had one suggestion, that the chief judge and any judge who has a forum should stand up and say, "Let's get together with the prosecutors. Let's come to some way where we jointly determine who goes to prison and who goes into a drug court," and try to get some humanity into this horribly unjust system.

Mr. Grodin later submitted some thoughts he had developed over recent years, highlighting his beliefs in the penal system as a whole. These are included in the text below:

As a concerned citizen and television commentator, I have looked at our justice system over the last several years and come to the following conclusions.

- Thousands of people who break the law have no idea of the consequences. I have never met an inmate who had ever heard of the Rockefeller drug laws. It is incumbent on us as a humane society to make young people aware of just what our laws are through speakers in every high school in the state.
- We must find some middle ground between mandatory sentences and too lenient judges. One size fits all is just not fair. We can do better than sentencing people based on weight of drugs rather than who the person is and their role in a transaction.
- I do not believe the state should be engaged in sting operations on ordinary poor people who are not drug dealers.

Life has taught us that even well off people succumb to temptation. We should not be entrapping poor people who are often in desperate financial straits with several children at home and no father. I am acquainted with one woman who served seventeen years because of such circumstances. Her children were devastated and some, in my opinion, will never recover. I believe probable cause should be used for stings just as it is for wiretaps. Otherwise we create crime.

- I believe that first time offenders who are addicts caught selling drugs should be given a chance to go to drug courts and the opportunity of rehabilitation.
- Thousands of people in our prisons are mentally ill and belong in psychiatric hospitals. I do not believe that people who are ill and commit heinous crimes should then be released into the society after they are deemed “well” a few years later, but we must do better with the mentally ill in our prisons.
- We must be more careful about releasing “dangerous” people back into society because they are capable of putting on an appealing presentation before a parole board.
- Capital punishment is clearly carried out unfairly toward the poor and for that reason alone, I believe it should be abolished. If there is available DNA it must be used before executing someone.
- Law enforcement should be much more active with youth gangs in every way possible to prevent crime. More infiltration and surveillance are essential for society as well as the youth’s well being.
- Often the underlying cause of crime is poverty and an overall cynicism that is felt by millions of our citizens. There is a belief by many that everyone in authority to some degree is crooked, so why shouldn’t they be? We must work to improve in those areas.

I believe if we address the above issues, we will have less crime and a justice system in which more of us can be proud.

Monroe H. Freedman*Hofstra University School of Law*

When I was a young man, I was doing a lot of civil rights, civil liberties, and indigent criminal defense work, and I believed in the constitutionalized adversarial system. I believed in the constitutional rights of the Fifth Amendment and the Sixth Amendment, due process of law, the right to the effective assistance of counsel, the right to trial including an advocate who was going to be your champion against a hostile world.

I believed in the standard of proof beyond a reasonable doubt. I believed in the right to confront witnesses against you, the privilege against self-incrimination, equal protection of the laws, and of the right of autonomy of each of us to decide the important things in his or her life.

I also believed in ethical ideals. As in New York, we have EC7-7, which says that in certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a defendant, a lawyer is entitled to make decisions. But otherwise, this is the New York Lawyers' Code of Professional Conduct, "but otherwise, the authority to make decisions is exclusively that of the client, and, if made within the framework of the law, such decisions are binding on the lawyer."

And EC7-8: "A lawyer should exert best efforts to ensure that decisions the clients are making are made only after the client has been informed of relevant considerations. In the final analysis, however, the lawyer should always remember that the decision whether to forgo legally available objectives or methods because of nonlegal factors is ultimately for the client and not for the lawyer."

And I believed in Disciplinary Rule 7-1 about a lawyer representing a client zealously and that "the lawyer shall not fail to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules." And because I believed all that stuff, I was considered a radical, so much so that Chief Justice Warren Burger led an effort to have me disbarred, unsuccessfully, ultimately, I should add, I guess.

Today, unrepentant, I still believe in all that crap.

And what I have found over the past two days is that that does not make me a radical; that makes me a stodgy reactionary.

I started out intrigued, and then I moved to concerned, and that took me to where I am: absolutely outraged.

Now, I do have a community, I think, that I can speak for, and that is the old-fashioned people who believe in the eighteenth century values of the Bill of Rights.

One of the things that I found myself wondering and hearing answers to, over the course of the two days is, What is the problem that the problem-solving courts are dealing with?

Well, one of them I heard—and this is the one that intrigued me—was the revolving door. But then what I found out was that this kind of problem-solving court benefits at best a minority of defendants and that the costs are a corruption of the constitutional role of the lawyer, of the criminal defense lawyer, and of his or her ethical obligations.

I heard the executive director of Brooklyn Defense Services talk about “a shift in attitude of public defenders in the way they see themselves,” meaning not as advocates for their clients, not as what the ABA calls “the client’s champion against a hostile world,” but as part of a team with the adversary, with the system, with the people who are there, from the client’s perspective, to do harm to the client.

I heard about the impact on defendants’ rights, especially on the rights of poor and minority members. Judge Hoffman, for example, who was critical of problem-solving courts, says, “In many drug courts, the team operates in daily rituals euphemistically called ‘staffing sessions.’ At these staffing sessions, the judge, prosecutor, public defender, but typically not private defense counsel, and some representative of the therapeutic community meet together in chambers to discuss all of that day’s upcoming matters. Defendants are not present, and the staffing sessions are not on the record.”

Well, I don’t know whether it is worse in those cases where defense counsel is not there or whether it is worse when the defense lawyer is there saying things, as were quoted by one judge, “I think my guy needs a couple of days in jail.” This is part of the benevolent coercion.

There are other problems I heard that problem-solving courts are dealing with. One is the clients avoid prison or the risk of it, and that’s a good thing. Prison is a horror. We take a human being, we lock him or her up in a cage like an animal, and we almost guarantee that that person is going to come out worse than when he or she went in. So, yes, that’s a problem to solve.

The criminalization of drugs, and especially the Rockefeller drug laws, that’s a problem to be solved. The overload of our courts,

public defenders, prosecutors, and judges, that's a problem to be solved. And the lack of access to therapy in poor communities, that's a problem to be solved.

But let me tell you, the solution is not group therapy in the courtroom. What I have concluded from what I have heard over these two days is that the problem-solving courts are an enormous diversion of time, creative thinking, funds (tens of millions of dollars) and work for therapy in communities. That's what we should be doing.

Somebody said at one point that we have these courts because of the failure of all the other systems. That's why we're doing this. Let us put all of this time and all of this energy, all of these resources, all of this creative thinking, into solving these problems instead of corrupting our constitutionalized adversary system which has existed for two centuries for some very good, common-sense reasons.

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My perspective comes from the small claims courts, where I direct Fordham's mediation program.

Small claims courts were probably the first problem-solving courts in this country, the true, original problem-solving courts. I think there are some important parallels between the development of small claims courts at the turn of the century and the development of these problem-solving courts, the modern problem-solving courts—drug courts, family courts—that have occurred at the end of the century. And I think there are some important lessons that we can learn from the reforms.

First of all, small claims courts were part of a reform movement that sought to do substantial justice—that's how our New York statute reads with small claims courts. They were created as a people's court where individuals could go without lawyers and be heard. These were people who had no other real access to justice; at least there was the perception they had no other access to justice.

For many people then and even now, based on our experience with small claims courts, the informal system of small claims is where it may be the first and last exposure that people have with the justice system. It's where lots of people, especially poor people, bring all their problems. They bring it under the rubric of a case for \$3000 or less, but peeled under the layers there are many, many, human stories.

Despite all of the good intentions, however, over the years since Roscoe Pound first developed this concept, something went wrong with the small claims courts, and I think this probably all happened in the name of efficiency. What we began to see in the complaints from communities were people saying, "I feel rushed by the process, I feel intimidated by the process, I'm not given enough time to tell my story." People want to tell their stories in small claims court. They have narratives, life narratives, to tell. And they didn't believe that they were really being understood.

The next response or the new response of reformers, I would say beginning in the eighties, to the reform of small claims courts was, "Let's go beyond the adversarial model"—just what we are doing now with our drug courts—"and let's adopt ADR and mediation programs, true problem solving."

We see in these small claims courts, which were in themselves a reform court, an embrace of the mediation process. Now for the first time in court mediation programs, the parties who are affected by the dispute are making the decisions, not the small claims judges.

The parties, the community, are reporting, "Well, this is wonderful. I'm going into a court and I have control of the outcome; the judge doesn't have control of the outcome."

At one level the community reacts and says, "This is the greatest thing since sliced bread." Despite mixed settlement rates, we have very high compliance with agreements made in small claims court and mediation programs. We have very high satisfaction rates. Even when people don't get what they wanted to get in the first place, they feel good about having participated in the process.

As a result of that, we have very durable solutions. I think the first point there is that when people who are affected by conflict have consent over the outcome of the dispute, of course, you are going to have more durable, long-lasting solutions.

Nevertheless, I think the same worries that we have with some of the mediation programs in small claims courts present issues which we should be worried about in the newer drug courts.

The first concern with mediation in small claims, indeed with all the court mediation programs, is the problem of informed consent. Many parties are entering into agreements without full knowledge of their legal rights. We have statistics from the American Bar Association that the average American, indeed, the majority of Americans, cannot afford a lawyer. And as cases become more subtle, even at the ordinary level of small claims courts, lots of cases involve legal rights that are being surrendered in the name of peaceful mediation agreements. That's a worry.

Coercion is a concern with this new reform of mediation. How often are people entering into agreements for reasons other than their true desires to settle? Manipulation is another concern we have in the mediation programs. Subtle pressures to settle, judges who are very concerned with docket control—there are these very strong, subtle pressures.

For example, "You don't have to settle here tonight in mediation, but then again, if you're prepared to come back for the next five months, you might have a chance to see a judge. We have 200, 300 cases on the docket."

And finally, the other concern, the final concern, is that judges would use this reform process of mediation as a dumping ground for cases that are unpopular or just too difficult to handle.

I raise these concerns as a caution because there is overlap and we are seeing spillover now into the modern problem-solving courts, and I think, in terms of solutions, we need to do a few things: first of all, go slowly, go slowly and carefully with innovation; and secondly, be very serious about evaluation. As much money as we put into instituting and implementing the programs needs to go into evaluation from the very beginning.

That leads into my third point of being open to the critiques and being honest about the critiques; and finally, to listen—in terms of gathering empirical data, we need to listen to the users of these courts, the community of users. Their voice matters here in terms of the effect of these courts.

I guess, in conclusion, I would echo the remarks of Judge Kaye last night, who talked about the need to take time to build a conceptual framework here and to develop core principles and best practices so that the reforms we're seeking are truly problem-solving; they truly do respond to people's real needs and interests and are not just a figment of our sort of feel-good imagination.

