

2002

The Judicial Perspective

Jo Ann Ferdinand
Brooklyn Treatment Court

William Schma
Kalamazoo County Circuit Court

James Yates
New York County Supreme Court

Peggy Hora
Alameda County Superior Court

John Martin
Institute for Court Management

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Law Commons](#)

Recommended Citation

Jo Ann Ferdinand, William Schma, James Yates, Peggy Hora, and John Martin, *The Judicial Perspective*, 29 Fordham Urb. L.J. 2011 (2002).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss5/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

FRIDAY, MARCH 1, 2002
AFTERNOON SESSION
THE JUDICIAL PERSPECTIVE

PANELISTS

Jo Ann Ferdinand

Brooklyn Treatment Court

William G. Schma

Kalamazoo County Circuit Court

James A. Yates

New York County Supreme Court

Peggy Hora

Alameda County Superior Court

John Martin

Institute for Court Management

Jo Ann Ferdinand*Brooklyn Treatment Court*

There was a lot of talk at the conference this morning and yesterday about coercion, and I was thinking that from the judicial perspective, there isn't a day when I do not speak to an audience that is only present because of coercion. The lawyers are there on pain of monetary sanctions. The defendants are there so that they don't get warrants. Even the court staff are there so that they get paid. So it is really quite a treat to be speaking to a voluntary audience and impressive that you all showed up after lunch.

I do want to add my thanks to Fordham University Law School for holding this Symposium on an issue for which I have a great deal of passion.

I preside in the Brooklyn Treatment Court, which is in Kings County here in New York City. We were the first treatment court to open in the City of New York and continue to be one of the largest in the country. Since we opened about six years ago, I have sent over 2000 people to substance abuse treatment programs and have seen over 700 of them successfully complete the Court's long-term treatment mandates.

Our court in Brooklyn was created really in response to the reality of the criminal justice situation, the fact that at least, in New York City, upwards of seventy percent of people who are arrested test positive for drug use, so that a substantial number of people caught up in the criminal justice system are there as a result of their own need to feed their addiction.

We knew that the traditional criminal justice responses to these individuals were simply not working. Whether I sent people to prison, placed them on probation, or ordered them to do community service, if their underlying issue of addiction was not addressed, they would continue to commit crimes and therefore appear back in my court.

The Treatment Court in Brooklyn was developed with a system-wide approach. Our theory is that if people are arrested for crimes and are substance abusers, they should be treated in the criminal justice system with a view towards their disease. They should be offered an opportunity to deal with their addiction and should be rewarded for doing so with a favorable resolution of their criminal case.

From the judicial point of view, I think there are three aspects of presiding in a drug court which are immensely rewarding. The first

is that it improves judicial decision-making by allowing me to make informed decisions. That is what I thought the job of a judge was: to make informed decisions. In fact, the reality of the situation in the criminal justice system is that you are making decisions with a minimal amount of information. This information is funneled by people who obviously have inconsistent points of view, while in a drug treatment court you are the recipient of information that comes from defense attorneys, the district attorney, and treatment providers who have exchanged all of the information at their disposal so that, in providing all of the information to the Court, we can together attempt to make a better decision.

Knowledge and sharing of facts really informs my decision, and when you add to that a knowledge of addiction and recovery, it means that the decisions can be that much more logical. A knowledge of addiction and recovery is really a crucial part of it. I heard somebody say earlier today that the lack of knowledge of addiction and recovery really permeates the criminal justice system, and I was a judge who allowed people an opportunity to go to treatment if they begged, if their lawyer pleaded, and if the DA was finally convinced. But I only allowed them a single chance. I thought that was what was appropriate, and I had no idea that recovery was not an event, but a process.

Therefore, a part of a problem-solving court is learning about things that go beyond the traditional knowledge of a judge—learning about the social science of treatment, learning about the hard science of addiction.

The other way in which decision-making is improved in a drug treatment court is that you get the opportunity to make decisions that are not only legally correct but fair. I have never heard myself say in the six years I have been in the Treatment Court something that I said on many, many occasions in the past: “I am constrained by the law not to grant that motion” or “I am unable to reach some conclusion despite the obvious fairness of that result.”

Well, that doesn't happen in a drug treatment court because we operate under a framework which is legally correct and then we are able to make decisions that are appropriate, fair, and take into account people's lives and the effect of the criminal justice system on their lives.

An amazing thing happens in a drug treatment court and that is when we all share the same goal; that is, the successful completion of a treatment mandate, you find that parties freed from their traditional constraints can really work together, so that you have

defense lawyers who no longer ask you to release someone from jail to go live with a drug-abusing spouse. You have defense attorneys who work with the treatment providers to ask that the person be released from jail to live in a drug-free environment.

You have police officers who come into court and no longer say, "This person gave me a hard time. I'm just waiting for you to put him in jail, judge." You have police officers who come into court and say, "Excuse me, judge. I picked this person up from his treatment program, and I promised I would bring them back." You have DAs who stand up in court, as I had on one occasion, and say, "Today I am dismissing twelve felonies and feeling that this is a job well done." By freeing people from their traditional roles, it allows us to make better decisions.

I think the third way in which the decision-making for a judge is improved is that the outcomes are satisfying, and by that I mean the outcomes make sense. As I said before, traditional sentences don't always make sense. It does not make sense to place someone on probation knowing that they are going to continue to use drugs. It does not make sense to put someone in jail because they have a disease, knowing that it is not going to be dealt with.

In my court I have found that at least eighty-eight percent of the people I have sent to treatment have completed four months of treatment. I have found that even the people who are unable to complete the mandate have improved outcomes.

The recidivism rate in a traditional court is, I think, somewhere between thirty and fifty percent of people released from jail are re-arrested within a year. Recidivism among drug court graduates in my court is about ten percent.

There are clear cost savings to a drug treatment court. The savings of prison cost is obvious, but there are health savings, drug-free babies, and children who can live with their parents and are not left in the foster care system.

In conclusion, I just want to go back for a moment to that notion of coercion. You know, most of us thought before drug treatment courts that people would not go to treatment unless they had hit bottom. When I took a look at the people I have seen in my court, fifty percent of them have a severe addiction and fifty percent of them have previous criminal convictions, and the median number of years they have been using drugs is eighteen years.

If those people haven't hit bottom, I am not sure who has. Of those people, fifty percent never sought treatment before they

found their way into my court. And, when offered an opportunity to go to treatment, ninety percent of them have accepted that offer.

Although there is coercion, in fact it is a decision made by people who, when offered a real opportunity to get help and salvage their lives, have taken advantage of the opportunity.

From my perspective, having sat in this court, it is better for decision-making, better for the court system, and clearly better for society.

William Schma*Kalamazoo County Circuit Court*

I am a circuit court judge in Kalamazoo County, Michigan, and that is our general court of jurisdiction comparable to your supreme court here.

I came at this issue from the drug treatment court perspective and started that about eleven years ago now, in 1991. In Kalamazoo, we began with the first court in the country that was gender-specific, that was for women. After that we started a court for men, and we've kept them separate, gender-specific, since then for a lot of reasons, and have also added a court for juveniles.

After some time spent with the drug treatment court movement, I got involved with and interested in therapeutic jurisprudence because of its wider applications, which then led to notions of problem-solving courts. And so that is kind of what brings me here.

I go to the theme of the conference, I guess, starting out, and note that it is talking about the movement from adversarial litigation to innovative jurisprudence. In my little spiel here, I will try to emphasize what I consider to be the innovative aspects of what it is that we are trying to do with problem-solving courts, limited not just to drug courts, I hope, but other ideas as well.

I would suggest that this is an evolving science and an evolving practice, and we are far from where we will be ten years from now, probably far from where we will be five years from now. A lot has happened in ten years, when I look back at the things that people have done in that period of time.

But with that all being said, I would like to risk some copyright infringement of Mr. Covey and give you my seven highly effective traits of problem-solving courts. If I run out of time, it may be only four or five.

First of all, these traits, none of them really stand alone. They are all interwoven, they kind of relate to each other and move back and forth with each other.

The first one that stands out in my mind is that an effective problem-solving court reflects a system mentality, not an individual, segmented, kind of bucket-to-bucket, as I usually like to describe it, mentality where we have in the past passed people from each of our respective buckets, done a really good job of processing them through it, from the police to the prosecutor to the court, and we keep dumping it down the line, and then it finally ends up back with the police in the streets.

That model is, I think, defective and needs to be changed such that it would reflect that we work in a system and that that system has the court at the center of it as the convener of the system's activities. Now, a lot of people get twitchy about the court being involved in administrative behavior at that point. It is good that people do get twitchy about these things, because it is a huge leap for the court to act as a convener of various agency activities in the community.

It is successful; it works. We're very proud of what was done before, and in some circumstances it works wonderfully, and it is the only way to do it, but in many circumstances it doesn't work well. Part of the evolving process is, I think, to find out when the system approach is appropriate and when it is not appropriate, and there will be some situations where it is not, and we have to simply avoid talking about problem-solving courts in those contexts and, if necessary, resort to the traditional models.

Part of the system approach is that we grow in self-awareness and in our self-understanding of who we are and what it is that we do as individuals. You know, one of the things that always amazes me is every time we get a new bar president in Michigan, the first thing they do is wring their hands over the deplorable state of the lawyers in our community and public attitudes towards lawyers.

The second thing that they do is they go out and hire a public relations expert to improve their image. And the third thing they do is they spend a lot of money on that. And the fourth thing that happens is the people still don't like the lawyers.

Now, if that doesn't finally get people in the legal profession to start thinking about themselves and who they are and who the public, their customers, perceive them to be, I don't know what will. If we are not perceived as being customer-responsive and community-responsive, the fault is not with the community, it is with ourselves.

I think a big part of this system attitude is to look at ourselves, define ourselves, think in new ways about who we are and try to work them into a kind of mentality so that we can, as Judge Ferdinand suggests, free people from their traditional roles so that they can work together in this system.

This has to start at every level. It has to exist at every level. It has to occur at every level. That means it has to be taught in the law schools. I am fortunate enough to be teaching therapeutic jurisprudence in a college right now, at a university in Kalamazoo, which thrills me, because I want to send these people to the folks in

the law schools and the people in the police academies and the people in the corrections field asking a lot of questions about these things and their role in the system.

But it certainly has a place and has to belong in the law schools themselves so that lawyers will begin to receive training in healing skills, emotional skills, collaborative skills.

We haven't been receiving that in the past, and we've got to get past the stage where therapeutic jurisprudence and those kinds of things are simply seminar courses that a few goofballs take because they don't want to take some other seminar course. These have to be part of the traditional role of raising lawyers so that it become a part of their self-concept and they understand how they fit into the social system.

One of the things that irritates the daylight out of me with judges is that, when they are exposed to some of these ideas, they will complain that they are not social workers. Well, when, obviously, seventy percent or more of the people that appear in front of me have social problems that have brought them there, you had better believe I am a social worker, and I had better have social-worker skills in order to address what it is that those people bring to me.

Justice Richard Goldstone, who is a member of the Constitutional Court of South Africa, said that we are really aggressive in understanding the law for its retributive powers and its ability to punish, but we have to understand its ability to heal. And I would suggest that that is a part of that self-concept.

That is a part of the second of these factors, which is knowing our clientele so that we can serve our customers. I have a *New Yorker* cartoon I love to use. It is a Wild West theme in a bar. The bartender is leaning over the bar looking at a dead man on the floor, and there's a cowpoke there with a gun in his hand that's smoking, and the bartender looks over at him and says, "I begged him to get some help."

I think that is what we've done and Judge Ferdinand referred to. We beg people to get help, and then when they don't because they don't understand their need for that help, we shoot them and we put them out of commission. That simply is a lack of knowing what our clientele is, so you have to understand that.

This notion of due process is an important idea. We judges obviously have to protect our role as the dispensers of due process. That comes from administering good and appropriate therapeutic jurisprudence. Therapeutic jurisprudence that becomes some no-

tion of therapeutic justice that spills over into paternalism is simply wrong and it is unconstitutional, and we have to avoid that.

On the other hand, due process never has been a static idea. If it has meant in the past fairness and equality, there is no reason why we cannot also try to expand our understanding of due process to come to appreciate the fact that it means that people that are given equal and fair treatment are also entitled to appropriate treatment under the law, and I suggest that that is a notion of due process that we should pursue.

Justice Holmes said that the life of the law has always had more to do with human experience than it has the syllogism, and we have to integrate that kind of thinking into our behavior in the court system.

We have to learn from the medical community. That is another important concept. The medical community, like us, wrongfully focused only on curing disease for a long time. There is a Dr. David Sack, a Canadian physician, who talks about three factors that physicians have to be familiar with. It is not just pathology or disease but it is also predicament and experience.

We have the same issues to deal with in the courts, and good problem-solving courts understand that, that the pathology, whatever it is that has brought somebody into the traditional court system, is not all that the person presents to us when we deal with them. We deal with their predicaments, their illnesses, their insurance problems, their employment problems, and good problem-solving courts are able to address all of this.

We are really good at institutionalizing shame and blame rituals in our secular culture. We have to learn in problem-solving courts to institutionalize redemptive symbols as well, and rituals. Drug treatment courts do that. Reentry courts do that. They bring people back and celebrate their redemption. We are talking about redeeming individuals. There is no reason that we can't institutionalize those symbols just like we have the negative ones.

We also have to learn to apply, as Judge Ferdinand has suggested, just plain old common sense. It doesn't make sense to do things the way that we have been for as long as we have been, getting the same results. We have to have the courage and the moral fortitude to, within the bounds of the law. It is absolutely appropriate, as Judge Ferdinand said; this can be done within the bounds of the law and is done all the time with legal strictures—

pursue these goals. And if we do, I think we will supervise the health of the patients and their return to health rather than their demise.

James A. Yates

New York County Supreme Court

This panel has been asked to provide a judicial perspective on the shift from adversarial litigation to innovative jurisprudence.

I come before you with a cautionary perspective, a concern that fundamental values and ethical principles are at risk as therapeutic justice expands. Since I am sensitive to the fact that problem-solving courts are popular and do perform certain functions well, and that my criticism may be unpopular, let me begin by acknowledging the benefits of these courts.

When properly funded, framed, and limited in scope, they provide an escape from unnecessary protracted litigation. They provide a useful dynamic—that is, counsel and a judge who are attuned to changing evolving situations, drug treatment, family conflict, homelessness, mental illness, and they work together to adjust their response to those changes.

They provide positive outcomes: treatment, community service, counseling, restitution, all in place of the hopeless jail or no-jail dilemma with otherwise confronts judges who sentence minor offenders.

I applaud all of this. However, as a philosophical matter, I do not believe that the ends can be used to justify the means, and I do not believe that an outcome-oriented justice model founded solely on regularized coercion as a means to an end should be expanded beyond the low-level infractions it was intended to address.

My greatest concern is that as we look to apply the model to more serious offenses, we slide into acceptance of a false dichotomy. We are told that we can have an adversarial system or we can have thoughtful dispositions and outcomes, but we cannot have both. Why? Those of us who love the law and cherish the American justice system cannot succumb to the argument that we must choose between respect for fundamental rights and a presumption of innocence on the one hand and sensible outcomes on the other.

It cannot be that principled adjudication and intelligent dispositions are incompatible. In an ideal world, every court would be a problem-solving court and a forum for just determinations as well. Courts would fairly adjudicate factual disputes, let the parties be heard, apply the law, and, upon a finding of guilt, impose thoughtful sanctions that benefit the parties and the community.

Unfortunately, problem-solving courts are often founded on the premise that all who enter are guilty and must abandon all hope or

vindication of rights. The adjudicative function is bypassed. Problem solving courts too often treat concern for process and assertion of rights as though they were the problem.

This occurs for two separate and distinct reasons. In lower courts inundated with petty offenses, overworked administrators do not have the time or resources for due process. In theory, judges in lower courts could adjudicate and then sanction with care. Instead, they are told that litigants cannot have both hearings and solutions.

In superior courts, where I work, the problem is even more pernicious. In New York, as a result of mandatory minimum sentencing laws, such as the Rockefeller drug laws, one adversary holds the keys to the doors for jail or treatment. It is an interested party, not the judge or administrators, who decides when creative solutions can be employed.

In superior courts, a defendant is told by his adversary to “abandon litigation and return for treatment,” not because the system is overburdened or because that choice is good for the community but merely because the district attorney demands it.

If we cared enough, we could create a system where a criminal defendant could be heard to complain when her rights were violated and then demand that the state afford due process before taking liberty or property, and follow this with an appropriate system of reward and punishment.

I am not against compelled treatment. I use it every day, just as Judge Ferdinand does, and I know it works. I am not against restorative justice. I just don't accept that it can only come at the expense of justice itself.

I sit in supreme court in New York County. The cases I see are felonies. Let me focus on the problems I see when the therapeutic model is superimposed upon a flawed foundation of mandatory minimum sentencing.

The defendants I see are, more often than not, repeat offenders. In the vast majority of cases, because of mandatory sentencing and plea-bargaining restrictions, an assistant district attorney, not the judge, decides what options are available for sentence.

We have a form of a problem-solving court. If an assistant district attorney allows it, alternatives to incarceration are permitted, either by way of deferred sentence, where a person earns escape from incarceration by performing certain duties, or by direct imposition of an alternative sentence.

An assistant district attorney decides whether a person can enter a treatment program, receive counseling, make restitution, or perform community service. The assistant district attorney, not the judge, decides how long the period of incarceration will be.

I reserve detailed commentary on the need for restoring judicial discretion for another forum, but suffice it to say that an assistant's decision is not guided by any rule of law. It can remain arbitrary, unexplained, and it is unreviewable.

I supervise a number of deferred-sentence cases, arrangements where an addict receives treatment, a juvenile receives training, a person with mental or emotional problems receives counseling, and cases where restitution or community service are performed over a period of time.

For all of those cases where prison was otherwise a required alternative, there are four critical points of adjudication: entry, maintenance, completion, and sanction upon failure. Someone needs to decide who gets in, who is failing, when ultimate success has been achieved, and what punishment should follow upon disregard or failure. These are critical moments in the progress of any case if a court seeks to solve a problem.

Any principled system of justice would assign those critical decisions to a neutral and detached arbiter. It is not just a matter of fairness, but I have learned over time that ineffective treatment follows when the subject feels he is not being treated fairly.

However, since the assistant district attorney controls the outcome, they seize control of those four decision-making moments. The outcome then becomes based on adversarial desires, not the needs of the defendant or of the community.

It is ironic that this forum assumes we are "moving," in its title, from an adversarial system to a therapeutic model. My experience with deferred-sentencing programs and DTAP programs in New York is not that we have dropped the adversarial system. To the contrary, we have empowered one adversary and handicapped the other. That does mean we have ended adversity.

A few examples may prove useful. First I will address entry. In order to escape unnecessary incarceration or receive treatment, under most DTAP contracts the defendant is told he cannot apply for bail, cannot testify in the grand jury, cannot move to suppress illegally obtained evidence, cannot complain about an involuntary confession, cannot complain of speedy-trial violations, cannot challenge the sufficiency of evidence in the grand jury, and definitely cannot seek a jury trial.

Instead, he must sign a contract waiving those rights and confess to the charge. If he has the misfortune to have been arrested with a co-defendant, he is often told he must implicate the co-defendant. If he refuses to do this, whether out of obstinacy, fear, or maybe just because he is telling the truth, he is denied a program. As well, he is likely to be denied an alternative sentence if his co-defendant refuses to join in the agreement, through no fault of the defendant, because it is inconvenient for the prosecutor to split cases.

If he was overcharged; that is, his participation was minimal or mitigating or exculpating factors exist, he must nonetheless confess to the charge, waiving any defenses and appeals. On occasion, this means treatment begins with a lie. In order to participate—and I see it every day—defendants admit to the top charge when they were probably guilty of less.

None of these requirements are essential to treatment or serve the public welfare, but they satisfy the district attorney's needs. They are not therapeutic. I appreciate that contrition and acceptance of responsibility are part of rehabilitation. But the contract requirements I described go far beyond the simple truth.

Second point, maintenance. Any deferred sentence comes with a certain probability that there will be slippage, occasional setbacks in treatment or performance. A true problem-solving court uses a carrot-and-stick approach, a system of graduated responses, to ultimately reform the offender.

However, the unfortunate reality of most deferred sentences controlled by an assistant is they are constructed and written in a way that an assistant can unilaterally and arbitrarily demand punishment for even minor noncompliance, without regard to opposing counsel, if they happen to show up, and without regard to judicial concerns.

I have seen assistants, usually youthful and inexperienced, who were raised in communities and circumstances far different from those of the defendant, proudly invoke zero-tolerance policies. I have seen, for example, a case where a woman stricken with cancer was prescribed a painkiller but was dropped from the program because it was inconsistent with the treatment, and the assistant demanded jail as the alternative.

I am going to skip through some parts but I do want to mention the two last points, completion and sanction upon failure.

Again, since the district attorney is the sole arbiter of a contract in a DTAP case, she decides when the case is over and whether the

defendant has earned dispensation. Since the standard contract calls for imprisonment of three to four years unless the defendant successfully completes the program, a frequent phenomenon occurs that I call moving the goal line—the prosecutor will demand things which were unanticipated or not included in the original contract.

For instance, years after a person has entered a drug treatment program and moved to independent living and a drug-free environment, there is a demand that they pass an English course or obtain a GED or have a certain level of savings in a bank account. Now, it may be that these are all good things, but they represent a new level of control by the assistant well beyond the initial decision by the defendant to become drug free and participate in treatment at the expense of risk of jail.

I offer this as another example of how problem-solving, the ideal, can become corrupted when the promise of collaborative decision-making is lost and handed to one party in the system.

And finally, sanction upon failure. The standard deferred-sentence contract in New York County specifies that the sentence will be imposed if the assistant district attorney determines that the defendant has failed or not successfully completed the program. Usually for a minor drug sale or possession with intent, that means four and a half to nine years' imprisonment. The judge as well as the parties sign this at the outset of the program.

This is a complete abdication of judicial discretion, sponsored and encouraged, unfortunately, by the defendant, who is eager to get into the program. It happens on occasion that a person is brought to court years after signing a contract. A hundred important changes may have occurred in that person's life, some good, some bad, but the court has contracted to give a particular sentence designated years ago in advance without regard to those factors.

I have concentrated just on the drug treatment issues because that is what people have spoken about. If I had more time, I would complain also about fragmentation, I would complain about diversion of limited resources, and I would complain about overly rigidly bureaucratic rules which artificially consign cases to one part when it may not be appropriate.

Peggy Hora*Alameda County Superior Court*

I am Peggy Hora, and I am a problem-solving judge.

Now, come on, you've been to twelve-step meetings, some of you. You know what you're supposed to say in response to that.

AUDIENCE: Hi, Peggy.

JUDGE HORA: That's what you're supposed to say.

If you haven't yet read Lonny Shavelson's book, *Hooked*, I recommend it to you. I want to read a short passage:

Drug court teams travel to the state capital for a meeting of the California Association of Drug Court Professionals in December of 1998. In the ornate ballrooms of the Doubletree Hotel, men and women in dark business suits mingle with others in relaxed sportswear, Black Muslim caps, and African dashikis. Then they all file into the chandeliered banquet hall to sit at elaborately set tables and dine, waiting for the opening remarks by the Honorable Darrell Stevens. Judge Stevens, a rural Butte County Superior Court judge, lists among his ardent community supporters such known radical organizations as the Chamber of Commerce and the Lions Club. As the main course is served by formally attired waiters, the dignified supervising judge for the Butte County Drug Courts ascends the podium, adjusts the microphone, and, in the best of revolutionary traditions, raises a tightly clenched fist in the air, proclaiming to a boisterous outcry from the audience, "We cannot be stopped. The momentum is here." A sea of clenched revolutionary fists rises in the air to join him, then returns to the chicken *cordon bleu*.

What happened to me and how I sort of got down this path was, seventeen years ago, I was minding my own business being a Legal Aid lawyer, and an opening came on the bench, and I decided to run for it, and I was lucky enough to win.

Well, Legal Aid in California is not like Legal Aid in New York. Legal Aid in California is all civil cases. It was housing cases, rights benefits, unemployment insurance, and consumer contracts. I didn't know a dog bite on a rear end from a human bite on the nose when it came to criminal law.

Criminal lawyers all talk in numbers. I had no idea that numbers could be verbs. And I got to the bench absolutely clueless about the people I would be dealing with.

The first year on the bench, I did what I thought I was supposed to do, and somebody would be found guilty, either by plea or by adjudication through trial, and I would impose a sentence, and they

would be back in front of me before I even knew it, and I would say, “Ha, he obviously didn’t learn his lesson.” So I would double it just to show him, you know, “Yeah, I’m real serious here, guy.” And then, a few months later, guess who was back again?

After about a year of this, I said, “Whoa! Something is so wrong here, because if this were happening to me, I would stop doing what that person is doing. So what is going on with these folks that is so terribly different from my whole life and world experience?”

I started reading about alcohol and other drugs. I started looking at issues of addiction. I went to my first seminar on the subject in 1987. By 1991, Jeff Tauber and I had chaired the first seminar, a statewide conference, on drugs for the state of California. We had never gotten any training on drugs, if you can imagine. When ninety percent of our cases in criminal law, seventy percent in abusive neglect—you know the statistics, I don’t have to tell you—are grounded in issues around substance abuse, we knew nothing, absolutely nothing.

Also by then, the Miami Dade court had started the drug treatment court, and we started the one in Oakland, California, which was the first in California and the second in the nation.

When we had that conference and we brought in researchers like Dr. Doug England (phonetic) from UCLA to talk about how coerced treatment works, to talk about the DUF statistics, as they were called then—they are now called ADAM—looking at people who were arrested, any given quarter for a week, and now thirty-five sites all over the United States, and over fifty percent every single time, sometimes as high as eighty-three percent in San Diego, the meth capital of the world a few years ago—eighty-three percent of people arrested were positive for methamphetamine—and it doesn’t even test alcohol. So just the big drugs between a low of fifty-three percent and highs of over eighty percent, and we started seeing how, at least in the criminal system, there was an underlying problem that was not being adequately addressed.

Around the same time, another movement was going on called community-oriented policing, where police officers were sick and tired of seeing these people, as we were sick of seeing these people come back over again. Heck, the defendants were released faster than the officer got his report written. And so this whole new approach to problem-solving policing, problem-solving courts, before we ever had that word, started to merge together.

The old style of policing was, “You call, we haul, that’s all.” And the old style of adjudicating the cases that were appropriate for

alternative adjudication, appropriate for treatment—see, I don't care if Jeffrey Dahmer had a drug problem. You kill people and chop them up and put their little burgers in the freezer; you go into jail forever, you know, you go into state prison. So I am not saying that all these cases need to be adjudicated with an alternative view to treatment when it is not appropriate, when the other crimes are so severe that it doesn't matter whether that's the problem.

I think you have to triage these cases. But the everyday low-level crimes, either felonies or misdemeanors, that we adjudicate day in and day out, it seemed to me, deserved some sort of special attention to see if this stuff would work.

The other thing that was happening at the same time was the Decade of the Brain. The nineties were the time when we learned more about this little gray matter up here than we ever knew before. PET scans had been developed so we could actually look in and give somebody a dose of cocaine, pay them to take cocaine—gosh, what a job, huh?—and watch the image on the screen of twenty-seven of the thirty-two reward-and-pleasure centers light up, and say, “Whew! This is a pretty strong drug.”

So we learned more about addiction. We learned more based on hard science and good facts about how to approach these things than we ever knew before. And there have been attempts made for decades to try to address these problems, the old farms, as you know, for the heroin addicts, for people who were addicted primarily at first to morphine. They were addicted because the doctors that prescribed the morphine didn't know it was even addictive. So we tried these things, but we didn't have the knowledge that we finally had in the nineties.

What comes out of that? What comes out of that is a drug treatment court which can either be pre-plea or post-adjudication. It can either be for felonies or misdemeanors. I think everybody gets much too hung up on whether it is a felony or a misdemeanor because it is a legislative decision that is not based on anything having to do with treatment.

In my state, if I catch you holding the cocaine before you've used it, it's a felony. If you're caught after you use the cocaine and you're loaded out of your mind, it's a misdemeanor. So one you can go to state prison for three years and one you can go to jail for a year. Okay, how does that make any sense? One is a minimum ninety days in county jail if you're caught loaded, and there is no minimum if you're caught before you use it. How does that make any sense?

Same chemical, cocaine, same little scientific notation. Rock it up, it's twice the sentence than if you snort it up. So we're punishing the route of ingestion of the same chemical in disparate ways.

You look around and you see the jail population explode to two million, and you've heard all the statistics for the last day or so, and you say, "This makes no sense." You see disproportionate numbers of people of color incarcerated.

I started looking at issues like the criminal prosecution of pregnant women who had used drugs during their pregnancy, and guess what? Out of the over 400 prosecutions, all but one woman has been a woman of color. Coincidence? Maybe, but I get real concerned, especially with the implications on freedom-of-choice issues, when women are being punished differently than men.

I came to this from a bunch of different directions, and I was very happy to be able to start what is now the fourth specific drug treatment court in our county, and I just want to tell you a little bit about my court.

Sue Finlay and I bunked at some conference or other, and at three in the morning, in the dark, we're still talking, saying, "You know, we really need to get to sleep now, but you know what one of my guys did the other day?"

I did a national survey with a social science friend, and we surveyed judges; judges in drug treatment courts, judges in traditional family courts, and judges in unified family courts, some of which applied the principles of therapeutic jurisprudence as Professor Babb talked about this morning, and, to no one's surprise, we found out judges who were working therapeutically had more job satisfaction, were happier little souls, felt that what they did was more productive.

All three courts felt it was the role of the court to help people. The other two kinds of courts, not so much the unified family courts and then the lowest poor souls, the un-unified family judges, were so dissatisfied with their ability to deliver on what they felt was the promise of being actually able to help people. So that research is published in *Court Review*.

I am going to leave you with one final story. Rodney is a person who has been battling with his schizophrenia since he was seventeen years old. He is now thirty-seven. He doesn't have very good social skills. He also uses crack cocaine when his medicines aren't working so well, and that's most of the time. Rodney is a huge chemical mess, and we keep trying to adjust his meds and get him to a place where he can do better and function better.

Two Thursdays ago was Valentine's Day, and it was one of Rodney's regular reporting days, and so I called his name, and he came up, and instead of stopping at the defense table, he kept walking toward the bench. Well, in regular court, my 230-pound, 6-foot-6 bailiff would have been on him like a dirty shirt, but he knows to leave him alone in drug treatment court.

Rodney came up and he handed me a dozen pink carnations. I said, "Are those for me, Rodney?" and he said, "Yes, they are." And it wasn't about me feeling good, although I did feel good. It was about Rodney being able to plan something, which for him is very complex, execute it, make eye contact, and actually have a human interaction.

His social worker recently told me that since he has been in drug treatment court, unlike every other year of the twenty years he has battled in schizophrenia, he has never been hospitalized.

Is this our problem in the courts? Should we be doing all this? Should we be the ones to be providing these social services and interventions? I don't know. But I will tell you one thing. Nobody else is doing it, and if not us, who? And if not now, when?

John Martin*Institute for Court Management*

Now, you have to make a real change in perspective here. You have to look at me as the embodiment of every chief judge or presiding judge of every trial court across the country, large and small, all right? The judicial perspective I am going to give is that of this collective mass of presiding judges and administrative judges, supervising judges, who are responsible for somehow figuring out the allocation of resources, the distribution of authority, trying to run an entire court system. So think of me now as this super-embodiment of presiding judgeness around the country.

I have spent the last few years trying to collect the comments of these people as they have tried to grapple with institutional change, as problem-solving courts in various places have attempted to become more institutionalized and as they have attempted to be introduced. So think of that bigger perspective for a moment.

What I am going to try to do is the following: I am going to raise five or six general areas of concern that judges with administrative responsibility for entire court systems often have. Then, after I go through those four or five, I am going to talk a little bit about what they might mean for the elements in a broader strategy for thinking about the implementation of innovations like problem-solving courts. So we will do two things here.

And, by the way, because I am the embodiment of all these people, when you want to complain about my comments, complain to your own presiding judge rather than me.

The five areas are, first: One of the things that I often hear from these folks is, How does your problem-solving effort fit in with the mission of our court? Now, most of you who have been involved in the problem-solving field get real tired of hearing that question. But I have to emphasize that that question is still out there and is not going to go away.

The more narrow aspect of that question is, "How does what you are proposing to me, judge, how does it fit into our strategic direction of our court at the moment?" Let me give you some examples. I was fortunate to have been involved in the implementation of many of these programs over the last number of decades, in fact, and in King County, Washington, for example, which was the home for really either the first or second mental health court.

Its implementation occurred in a very specific context, and it is important to remember that context, that as they implemented the

mental health court in King County, which is largely Seattle and the suburbs, there were some other very specific goals that were embedded into the notion of implementing their mental health court. It served a lot of other purposes.

They wanted to do the good things. They wanted to address a population that was woefully not being served and so on and so forth. At the same time, though, there were other goals that were part of that program. In particular, they had experienced tremendous declines in caseload, like many courts across the country. Don't forget that just as many courts are experiencing declining caseloads as increasing caseloads. They suddenly had excess capacity. They were in a position where they could actually figure out not just that something needed to be done, but that they were in a position where they were actually able to do something about it.

The second goal was they were able to recognize that it fulfilled some of their other goals about outreach to the community, about access to justice and serving unserved populations, and finally, it gave them an opportunity to work with the superior court in ways that they had not been able to work with before. So it served a lot of other goals.

I think if you go to most examples of innovation in problem-solving court, there are example after examples of the need to deal with multiple goals which often reach far beyond the immediate goals of the program, and that is something that chief judges, presiding judges, ask about all the time. I am not going to go into too many other examples, but I think, if you go back to Miami Dade or any of these, there are many, many things going on.

The second is, if I am a chief judge, I want to know as best as you can possibly tell me what is the extent of the infrastructure required to really make this thing work.

What is the extent of the infrastructure required to make the thing work? And this is a tough question and it is one, frankly, that we've gotten better at trying to identify as time goes on.

By infrastructure I mean both the hard infrastructure of the technology, the facilities, the equipment, but also the softer infrastructure. Do we have the staff and, more importantly, are the staff trained, are the judges trained in a way that they have the knowledge to provide the kinds of services that we are promising people that we are going to provide?

Let me just mention some of the other areas of infrastructure that are often brought up. It's the planning. Are we able, for example, to plan with other agencies? Many, many jurisdictions find

that the introduction of problem-solving courts produces a crisis in planning where for the first time they really have to do some long-range and strategic planning with justice agencies and treatment providers in ways that they have not done before.

Second is just the management itself: Can I really supervise other agencies in the way that I need to be able to make these things work?

The policymaking is the third and the decision-making that requires changes in the way some other folks are going to be making decisions, both within and outside the court. There are tremendous issues of coordination and communication.

I talked about staffing and training. Other people have talked here about the finance and budgeting. There are lots of budgeting-related issues, and it is not just the amount, it is the flexibility. You mentioned the flexibility to use resources, to bring resources from other places to help support the effort. Then there is finally a whole area of performance measurement.

The second issue, then, is a very thorough assessment of what really is required in terms of infrastructure to make this thing work, and do I have even a remote chance of ever having that be adequate? Today we heard the conversations about technology, which are very revealing. One of the biggest challenges facing problem solving courts is in dealing with the lack of infrastructure.

We already know as time goes on that the difficulties of the technology required to get the kinds of records, the kinds of information that are needed for judges to be able to make the decisions that they need to make are often not there, and that is one of the real focal points, trying to figure out how the heck do you get that.

A third area of questions center around this whole notion of system-wide impacts. How does me working with you, the chief judge working with some of my judges on implementing a drug court, how is that going to affect the rest of my court system? Does that mean—and you've all heard this—does that mean that somehow I'm losing three bodies? You know, often that's the way. Oh my gosh, I don't have three bodies, three judges, that I'm now able to assign other cases to, blah, blah, blah. All these kinds of system-wide impacts are important.

Related to that is this whole notion of recognizing that there are also going to be unintended consequences. I have seen with the introduction of these innovations dramatic changes in the way the police act. They either quit arresting certain kinds of offenders simply because they don't agree with the policy or they start to

arrest many more kinds of offenders. But anyway, trying to anticipate what some of those unintended consequences might be is a third area.

The fourth we talked about in quite a bit of detail, the whole notion of institutionalizing and the sustainability of problem-solving courts. As we speak today, Dade County, many of their programs are threatened. As many of you know, the drug court is one area of innovation, but a second, more recent one was they did an awful lot of work in family court, and they were able to get essential case managers in the court system that were very critical to that aspect of their problem-solving court effort.

That is all now in jeopardy as a result of moves to statewide funding, and there are some real questions about, well, we kind of got it sustainable for some period of time. Now how do we convince people, now that we have to do it on a statewide level, that this is valuable? Somehow it has resulted in that court having to make a pitch for problem-solving courts statewide just to be able to maintain what it has in its own jurisdiction. So there are often these kinds of things.

I see people from California smiling. One of my clients is the Los Angeles Superior Court. This is the story of our life at this point in Los Angeles, trying to figure out how do we make all this stuff fit together, sustainable, at a time when we're going through this whole notion of unification and state funding.

The fifth point, and I am not even going to dwell on this one, but the point is whether these lead to better outcomes is something that we really do have to get a handle on. Frankly, it's this whole notion of having consistent outcomes that we hold the entire system to the same standards that we're holding our problem-solving courts to.

There are three things that we should do as we take all this into account when we develop new strategies.

The first, in my mind, is forget talking about problem-solving courts as a generic term or as a phenomenon. I think there is not much utility in that anymore. We've seen within the drug court context, for example, that there is such a divergence in the models used that in some cases you don't want to be hooked with what is being called a drug court; in other cases, they mean such totally different things.

The bottom line there is you have to get into details about who you're really targeting in any of these activities, what your outcomes are, and really, a lot of talk about the infrastructure and

what that might look like. So, from here on out, in my mind, I would quit using the word “problem-solving court.”

There is also something that we talked about with a number of people, this notion that the proliferation of the term, it doesn't apply to the same things. You're losing meaning, you're losing the spirit and enthusiasm that may be there. It may be inappropriate to use at all.

The first piece of my strategy is get rid of the term “problem-solving courts” unless you're in a position where you can go into great detail about what you really mean specifically, problem-solving court in condition X, Y, and Z.

The second is this whole notion that we have to recognize that this is not going to reform the courts in general. To put on the burden of this thing we're not calling problem-solving courts anymore, the burden that somehow that is going to address all the problems that have emerged and frankly not been addressed in the bigger venue of court reform is ludicrous and one that we really do need to quit doing.

Let me give you some examples. In the thirty years I have been involved, I am so offended by the changes in discretion and authority of the courts and the judges. That is something we have to confront directly in other ways. That's a horrible issue area and one that we have to deal with and have to have the guts to deal with in ways that we haven't been in the last twenty years, instead of thinking that we're going to be able to do it through the back door of something else.

You can go through example after example where we really need to get back to the business of court reform as well as problem-solving in the same breath.

Now, I want to extend that even further. A lot of you are way too willing to undertake the burdens of society. Mental health? How did we get in this mental health business? There is another dimension of reform that maybe we need to be involved in a little different way than thinking that we're going to be able to resolve these things from the standpoint of mental health courts.

The reality is that there is so much change in mental health law, as you know, but the other side of the equation was not followed through where facilities, the alternatives for supporting people with mental illness, haven't arisen. Well, maybe we need to recognize that we really are in the mental health reform business, but we cannot do that just through the court; we have to do that in a different way.

The final thing may be the most difficult, and that is trying to anticipate the future. You all are going to have to become futurists to some extent. Just as we now know a lot more, for example, about the dynamics of substance abuse and addiction and all those kinds of things, there are things emerging now that we need to be able to know more about, and we need to start to build in the potential implications for that now instead of later.

Let me give you a couple of examples. This is a whole other series of lectures. But because of some other sorts of genetic and nano-engineering and things like that, the effects of substance use, the reasons why people get high, there's possibilities of introducing those effects that do not involve the fairly frequent introduction of substances into people's bodies.

What do you do when, for example, people can have some way of electronically stimulating the kinds of things that trigger the same responses that substance use does today, those kinds of things? Well, these are not—we all kind of laugh and we think, "Uh," but the reality is that those are not very far on the horizon.

JUDGE HORA: Do you mean Woody Allen is right: We will have an orgasmatron?

JUDGE MARTIN: Exactly. Those kinds of things are something that we need to start to anticipate and look at what that might mean for the models that we have. And I will end with that.

Questions and Answers

QUESTION: What is the possibility of mainstreaming throughout the courts the principles of problem-solving courts and integrating those successfully into mainstream courts?

JUDGE FERDINAND: Brooklyn is now in the midst of opening a court which will attempt to take the drug treatment court model and make it available to every case, every nonviolent case, that comes into the courts in Brooklyn.

Judge Kaye has created an office as part of her office to not only expand drug treatment courts and problem-solving courts around the state, but really Judge Trafficanti, who heads that, has said his goal is to have every court be a problem-solving court. So I think that there is a philosophy that suggests that it needs to be expanded.

JUDGE HORA: I think one of the keys is to make sure that we have sufficient education for all players in the system. Once you know this stuff, you can never go back to business as usual.

There is a course at the National Judicial College, one on substance abuse, another on co-occurring mental health disorders, a third on problem-solving courts—there are flyers out there on that. Through Marilyn Roberts' Drug Court Program Office that we are just about to launch, a cultural competence curriculum for all drug courts who receive federal funding, who will be required to take this course, and it will be offered to courts throughout the United States, and that is something that can be used by any court, any time.

There are courses within the National Drug Court Institute. There are courses within their own state judicial education offices.

That is a key, I think, to integration of these ideas, because, you know what? We get scammed all the time. You know, "I tested dirty because I ate a poppy-seed bagel." Well, that's lovely except for the fact that poppy seeds in this country are sterilized, and you would have to eat a bagel the size of a Volkswagen to actually test dirty, so don't tell me that.

But if you don't know that, and you say, "Oh, gosh, well, I won't send a guy to jail over a bagel," well, you just got scammed. You just got scammed big time.

JUDGE SCHMA: If I could just respond on that question of expanding to other courts, it is certainly important for us all to remember that we all come from different environments. I am not from New York, and you folks that are from New York are not

from Michigan, and there are certain things you can do some places that you cannot do other places.

I would tie this to something I think Professor Babb said earlier today, and that is that none of this is really going to be effective without judicial leadership, and the legal community has to press its judicial leaders to get involved in these kinds of things, because without it, the lawyers won't come along, the Department of Corrections officials won't come along. At least in every place that I've seen this happen, it does not happen without judicial leadership. If there is judicial leadership, that is, I believe judges are capable of creating a legal culture in their courtrooms. Judges who are determined to do these kinds of things in other environments than these so-called problem-solving court specialized areas, they've got the right and the ability to insist on how people are going to act when they come to their courtroom.

In my ordinary, regular, everyday court, whether it's a medical malpractice lawsuit or it's a domestic relations case or it's a criminal cases, people know that they are going to be expected, the lawyers know that they are going to be expected to deal with substance abuse issues if they are present in this little cosmos that is going to be brought into the courtroom.

And they come prepared for that. They ask me a lot of questions. The court becomes a referral agency. It becomes an educator. But if the court takes on that responsibility—and I think it must and should, for all the reasons we've talked about here—it can transfer that in many areas. It is limited only by the creativity of the judicial leadership.

QUESTION: My question for the panel is, within your sentencing structures, do judges have any legal authority to mandate treatment in correctional settings?

JUDGE YATES: The answer is yes and no, and it is sort of pathetic, and that is, about five or six years ago, I forget the year, in New York a program was started called supervised parole. There is also a shock incarceration program. But they put so many limits and strictures on it. One particular limit that they put on supervised parole, meaning a short period of incarceration and then treatment out, is that they made the felony level so low that anybody who sells one grain, one four-hundredth of an ounce of cocaine or possesses with intent just a couple of grains, less than an Equal packet, even as a first offender, cannot get in the program without the DA's consent. So it becomes a joke.

JUDGE HORA: The other thing you can do, however, is, as in my county, we have a committee on the unmet need of women prisoners, and one of the things we looked at was substance abuse issues, being batterer survivors, parenting issues, and all those programs are now in place.

We found out when we offered parenting classes and coupled it with contact visits with the children, the people were much more motivated to take the classes. But guess what happened? The men got visits every week from their kids because the wives brought them. The women did not get a visit because nobody was bringing those kids to her.

So what we did is we shifted them all down; we being the sheriff, with some judicial leadership, we shifted them all down to the community reentry center. We bought a van, and we go out and get the kids and bring them to her, so that they actually get contact visits with their children.

We can look at things, like how pregnant women are treated in jail, look at the miscarriage rate, and say, Why in my county was the miscarriage rate ninety-eight percent for women who were incarcerated? Because there was no supervised detox for women who were on depressants, and so forth.

We can look at being judicial leaders and having the bully pulpit to say mandatory minimum sentencing for non-violent drug offenders is wrong, it's just wrong, and we can take that stand. There's lots we can do with judicial leadership that we may not have the power to mandate but we have the referent power to bring people along for.

VOICE: Last question here?

QUESTION: You've made a lot of suggestions about the areas to extend the problem-solving model. Could you suggest areas to which the problem-solving model should not be applied by judges and courts?

JUDGE HORA: Well, I can. Where we don't have a good scientific basis for what we're doing. The reason: looking at substance abuse problems and mental health issues are twofold. One, it's pernicious. It's in your courtroom every single day, so if you don't think you have a drug court, you're wrong. If you have a criminal court or a dependency court, you have a drug court.

But we have good science now. That is what I was talking about, this decade of the nineties, the wonderful expansion of knowledge about substance abuse treatment. So we shouldn't go mucking

about with bad science where we don't know what is really good and what is really not.

There are these mandatory batterers' treatment programs. I have not seen sufficient evidence with which I am comfortable. I must mandate it because that is the law, and I do, and I hound them to do their fifty-two weeks. But I am not comfortable saying that that works, because I have not seen data to suggest that it does.

I would say where we have a good grounding and hard science and we are convinced to a reasonable amount as a judge, yes, that we can get involved. If we don't know what the Sam Hill we're doing or it's junk science, stay the heck out.

JUDGE MARTIN: I would extend that to the notion of what's culturally appropriate, too. I think that is one of the great challenges. I would refer to it as an infrastructure challenge, but the notion that somehow we have the treatment, the kinds of resources out there to really deal with diverse populations, in my experience it is simply not true. It's not there.

JUDGE YATES: I think your question points out exactly the problem with calling things problem-solving courts because what it does is it envisions, instead of everybody having resources, training, and sensitivity, it envisions that somehow or other there are classifications that should be drawn up in the abstract before you've even seen the situation.

You know, it would be easy to sit there and say, "Oh, no. Homicide should not be handled by a problem-solving court." But what do you do when you have a 14-year-old girl who gives birth in a locker room and then kills the baby? You're not supposed to be sensitive, you're not supposed to be trained, you're not supposed to have resources? It's ridiculous.

That's why it's artificial to call things problem-solving courts, because it just separates out things that are not, quote, problem-solved.