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The Changing Face of Justice: The Evolution of Problem Solving

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**THE CHANGING FACE OF JUSTICE: THE EVOLUTION OF
PROBLEM SOLVING****PANELISTS****Joseph E. Gubbay***Kings County Criminal Court***Morris B. Hoffman***Denver District Court***Martin G. Karopkin***Kings County Criminal Court***Marilyn Roberts***Department of Justice***Bruce J. Winick***University of Miami School of Law***Lisa C. Smith***Brooklyn Law School*

Joseph E. Gubbay

Kings County Criminal Court

The theme of today's program is the court as problem solver. For the judge, this is not a new role. The extent to which a judge immerses him- or herself in problem solving is only limited, in my view, by their individual personality and how each particular judge personally views the judicial role, rather than the limitations of the judiciary as an institution.

That being said, you have heard, and will continue to hear, of judges who preside over or are developing treatment courts specializing in the treatment of defendants who are chemically addicted or mentally ill. These specialty courts, indeed, are a relatively new phenomenon.

For nearly a year now, working with the New York State Office of Court Administration, the Kings County District Attorney's Office, the Legal Aid Society, Brooklyn Defender Services, we have been developing a treatment court for persistent misdemeanor substance abusers.

Presently, Brooklyn is the base of the Brooklyn Treatment Court, which addresses substance abusers charged with felonies. That court, which serves as a national model, differs from the contemplated Kings Criminal Treatment Court in that each defendant will not be exposed to lengthy upstate jail time in the event of noncompliance.

Developing a treatment court for misdemeanants, therefore, tests the model of coercive treatment insofar as the heavy hammer of jail time, traditionally thought to be the main motivating element for compliance, no longer is as significant a factor.

When the threatened coercive effect of incarceration is removed from the equation, how effectively can the court compel treatment? This, of course, frames the critical challenge for judge, prosecutor, defense attorney, and treatment case manager in the misdemeanor context.

The answer, I believe, lies in the effects of long-term treatment, judicial monitoring, and engagement between the judge, the defendant, and the treatment case manager. Once a defendant is engaged in long-term therapy and experiences the rewards of a life not driven by chemical addiction, the defendant herself will be motivated to complete treatment. This, of course, is an optimistic view.

I am not a statistician. I cannot tell you how many addicted who have graduated from treatment courts have been re-arrested. I am sure there are people here who can give you those numbers.

But what I am able to tell you is that treatment is our best hope. It may not result initially in a life of abstinence, but it does work, and the longer and more frequently one is exposed to therapy, the better the chances are of recovery. The first several attempts at therapy may not result in abstinence, but once the defendant is engaged, once effective therapy takes hold, the person's chances of recovery are dramatically improved.

It is obvious to any judge who hears these kinds of cases that an addict who is sentenced to prison generally upon release remains an addict and the criminal cycle continues to repeat itself. Treatment, while there is no guarantee for success, at least gives society and the individual a chance to break the cycle of addiction.

I have met with judges across the country who believe that treatment works, and certainly works better than incarceration as a first resort. And these are judges from the country's most conservative jurisdictions, including Georgia, Florida, Kentucky, Oklahoma, Arkansas, Colorado, Idaho, Tennessee, Utah, Virginia, and Wyoming. Judges in each of these states are creating drug treatment courts or adding to those which have already been developed.

I would like to tell you a true story. It happened about three weeks ago. My daughter and I were in Home Depot and I was approached by a forty-year-old man who looked familiar to me, but I did not know exactly how I knew him. He found himself in the same predicament, of recognizing my face but not being able to place it. He asked me how we knew each other. My first words were, "120 Schermerhorn Street?" with a question mark at the end, the address of Criminal Court in Brooklyn. I figured my chances were good, since 100,000 people pass through those halls every year.

"You're my judge," was his first response, followed immediately by the words, "I'm still clean." Here was a man who was in residential therapy for nearly a year, who had battled his cocaine addiction and was now back to work as a building contractor.

Yes, he may in the future lose another round in his lifelong battle with addiction, because an addict is never completely cured. Rather than reaching a state of cured, the addict is able to learn a healthy and lawful response when a cue in his environment triggers a craving for the drug.

Of important note: while an addict may have an incurable disease, she is still capable of learning how to cope with her disease and to take steps to manage it. That remains the responsibility of the addict. Treatment Court forces the addict to take responsibility for managing their disease, and failure to accept these responsibilities may result in either a treatment response, a punitive response, or both.

Every case is not as successful as the man from Home Depot. Many, frankly, are not. There was the young man, not even twenty when he appeared before me for drug possession, whose father had first introduced him to heroin. After pleading guilty to misdemeanor drug possession, he was released to a city-wide not-for-profit organization, actually the TASK organization that Lisa Schreibersdorf mentioned earlier. I monitored his compliance bi-weekly, every two weeks. After several weeks of compliance, he absconded from the program, was re-arrested for drug possession, and was returned to me.

After being incarcerated for nearly six weeks, another residential program was found. He still wanted treatment and I was determined to try to help him. He complied with the second program for about two months and absconded again.

Brought back to me on his third round of misdemeanor possession. At this point, he was thoroughly discouraged and asked for me to simply sentence him to prison. Before me was a non-violent, young man who was in fact—and I say this without any naivete—a compelling, bright kid with a lot of potential. In my mind, jail was the easy way out, and typically jail is the easy way out.

I persuaded him to try therapy again. He was released to a half-way house until a residential therapy community could be found. He seemed to be doing very well for nearly two months. He was testing clean. He made all his court appointments. He looked well. Then he disappeared. I was told he died from an overdose.

This is a business that has its measures of success and failure. What standard one uses to measure each is subjective and open to enormous discussion. I hope today will inform that debate.

This I can tell you: Even if there is repeated failure, it is not a sufficient justification to give up, to turn to incarceration as a first resort rather than to offer treatment.

You will next hear from Judge Hoffman. He has a very different philosophical approach with respect to courts interceding in the lives of addicted defendants. Judge Hoffman raises serious and important questions about the risks involved when the judiciary seeks

to strongly encourage—and, indeed, compel— treatment. I understand these risks, but see greater consequences in the failure to act in this context.

Morris B. Hoffman*Denver District Court*

I am a state trial judge in Denver, Colorado. I first want to start by apologizing for my oratory skills. When one spends one's day saying nothing more complicated than "sustained" and "overruled," those skills sometimes atrophy. I also want to thank the *Urban Law Journal*, and especially Subha Dhanaraj, for inviting me here today.

I feel a little bit like an atheist at a revival meeting. When you read the article that I submitted for this Symposium, you will see that I think there are lots and lots of problems with problem-solving courts, starting with the fact that there is no reliable data, in my view, that they accomplish anything other than making judges feel warm and fuzzy about what we are doing, and going all the way to some deeper philosophical and criminological issues that include an improper retreat from retribution and what I think is an unfortunate compromise of 200 years' worth of judicial independence.

But because you can read that article, and because I do not want you to start throwing tomatoes at me here today, I have decided not to talk about the article. You can read that.

What I want to talk about instead, especially since the topic of this session is "The Evolution of Problem-Solving Courts" and we started off talking about "The Birth of a Problem-Solving Court," I want to talk to you about what has happened to the Denver Drug Court, what has happened since its birth to today, where it is on life support.

I want to talk about that evolution because I think what happened to our court—I am not entirely sure what general things we can conclude from our experience, but I think that there may be things symptomatic of what happened in Denver that tell us something about what is wrong with the drug court movement in general, and with the therapeutic jurisprudence movement also.

Those of you who are more interested in some detail, because I have some limited time, can read a piece that I am doing for the *Federal Sentencing Reporter* that should be coming out later this spring, called "The Rehabilitative Ideal and the Drug Court Reality."

Our Drug Court is a felony-level drug court. In Colorado our felony courts are called district courts and our misdemeanor courts are called county courts.

Our Drug Court started on July 1, 1994, and it started having problems on July 2, 1994, when we realized that the very presence of the Drug Court was stimulating an enormous increase in drug filings. There was massive net widening in Denver. What was happening was the usual constraints on arrest discretion, on prosecutorial charging discretion, were gone because police and prosecutors were not out searching for criminals, they were out trolling for patients. Because of that, our drug filings tripled in two years—tripled.

Because of that massive net widening, what happened from the very beginning to today is that we made all kinds of compromises, and we made so many compromises that today our Drug Court is very different than it was when it started. I want to just run through those changes, at the risk of depressing all of you.

What happened in the very beginning, as we realized about three weeks into the Drug Court, was that it was so busy that it couldn't do any trials, which was one of the things that the proponents promised it could do. So what was happening was, because they couldn't do any trials, when once in a while a drug defendant would request the quaint right to a jury trial, staff of the Drug Court would have to scramble around and find a regular criminal judge who was free and willing to take the Drug Court transfer.

An interesting thing happened. We became as a bench less and less willing to take those transfers, and I can tell you from personal experience why.

The lawyers were bad—and understandably. These are usually young prosecutors, young public defenders. They spend their day arguing about whether a defendant should be given five days or ten days in jail for a hot UA, instead of doing trials.

The trials were bad. The evidence was often unsupportable of a conviction. There were oftentimes serious search-and-seizure issues involved in these cases because of the nature of the drug crime beast.

I haven't done particular statistics about this, but it is my sense. I would guess that about 90 percent of the drug cases we see in the Denver District Court are for \$20.00 and \$15.00 and \$10.00 hand-to-hand drug transactions, again because of this change in the police and prosecution functions.

It got so bad in terms of our unwillingness to take transfers from the Drug Court that we abandoned the voluntary system, and now the way it works is that when the Drug Court has a transfer, they send the case to me as the presiding judge in Criminal, and then I

just send it to one of my colleagues in Criminal on an involuntary rotational basis.

The same thing, after a couple months, started happening with motions hearings, so now the Drug Court also does not have any time to do any of its motions hearings. Those motions hearings first voluntarily got sent to the rest of us and then are now being involuntarily sent to the rest of us.

I should say that the Drug Court in Denver started as an “all comers” court, meaning there were no disqualifications to eligibility. The only disqualification was if the current drug felony charge was coupled with a violent felony during that incident. There were no limitations about prior felonies or anything like that. It is called, I think, in the literature an “all comers” court.

By 1997, three years after its institution, the dockets forced the then-Drug Court judge to change the nature of the Denver Drug Court. It is no longer an “all comers” court. We exclude people with two prior felony convictions. We exclude people who are illegal aliens and subject to an INS hold. And at least the first exclusion is really controversial. Drug Court proponents, and I think rightly so, say that the people most in need of drug treatment are the hard-core addicts who, more likely than not, have many more than two prior felony convictions. They do not get any treatment in our Drug Court.

Also, shortly after we started, as different judges came in—and no judge stayed there longer than a couple of years—as different judges came in, the way of doing reviews changed. Most significantly, the frequency of those reviews changed.

When Bill Myer, who was our local champion who started our Drug Court, started, he was doing frequent reviews—bi-weekly, I think, depending on what phase the defendant was in. By the time we got to his second successor, those reviews were down to bi-monthly, every other month, and they have gotten worse over time.

In fact, two years ago, again because of docket pressures, we shifted all of the pre-adjudicatory work in Drug Court down to our County Court. So in Denver today the Denver Drug Court does not even see a defendant for the first time until he is there to plead. I know that is contrary to all of the therapeutic suggestions, that the whole purpose of Drug Court is to have the judge be sort of a continuous, unpleasant force in drug defendants’ lives. That is not happening in Denver.

We lost all of our federal grant money. Our state legislature refused to fund us. In fact, I know there is somebody here from the

Drug Court Program Office. It occurred to me from this experience that the federal government is like a heroin dealer. They give these grants to start these programs and then they take them away.

And so we have been scrambling around with the financial situation, really since day one of our Drug Court, as I am sure all of you have also. We have tried to do creative things with our general funding. I told everybody the other day that we need Arthur Andersen to come in and set up some offshore limited partnerships.

We have been trying lots of things, including begging the County Court to hire the Drug Court Magistrate, who is now being hired out of County Court funds.

News on the empirical front was not any better. We hired some researchers from the University of Denver to do a study on the effectiveness of our Drug Court. In 1997 they published a report. What they did is look at re-arrest rates two years out and they compared people who went into and came out of Drug Court to a control group of defendants who were dealt with in the traditional criminal felony courts in Denver before the Drug Court.

Their results were depressing. The people who went into Drug Court had a one-year re-arrest recidivism rate of fifty-three percent, compared to the one-year recidivism rate of traditional drug defendants of fifty-eight percent. That five percent difference was within the margin of error of that study. In other words, Drug Court was having no impact reducing recidivism.

That, by the way, is consistent with the 1991 study that the ABA did of the famed Dade County Drug Court. The results of that study were thirty-three percent traditional recidivism and the Drug Court accomplished a thirty-two percent recidivism rate, again within the margin of error.

I know there have been lots more studies. I am really interested in hearing what Steven Belenko has to say. He may prove me wrong about what these studies mean.

In fact, today, in about three hours, we are having an en banc to decide whether—and to keep up the birth of the Drug Court—to decide whether we are going to pull the plug on the Denver Drug Court. Don't get excited. Even though I am here, I have left a proxy, so they will be getting my vote.

Again, as I said, I am not entirely sure what this experience means. It may mean that we were bad managers. It may mean that we bit off more than we could chew. It may mean that the people after the original Drug Court judge were not as committed to the Drug Court as he was. I never was in the Drug Court. It

was a voluntary assignment and I never volunteered. Maybe we hadn't been to enough of these national motivational meetings that go on all over the country about Drug Court.

But I think it also could be that our experience was endemic to any felony system that is overtaxed, where the drug courts, by definition, divert resources from the prosecution of serious felonies, so that judges who do not really think that drug use should be a crime can assuage their consciences when they send those people to prison.

In this new enlightened view, we do not send people to prison for drug use; we send them for refusing to be cured, and it is on that point that I want to end.

In Denver it really was remarkable—and I would be very interested to know if this is happening elsewhere, and there really are no statistics that I am aware of—in Denver we sent twice as many people to prison on drug charges after the Drug Court than we did before the Drug Court. That may seem a strange result for a court that is specifically designed to save taxpayers all kinds of money by treating drug users instead of imprisoning them, but actually when you think about it, it is an entirely predictable result of the confluence of massive net widening and dismal treatment results. When you triple the number of drug cases and do not triple the rate of treatment success, you end up sending more people to prison, and that has certainly been our experience.

I want to end, at the risk of getting back to some of the philosophical and criminological issues that are in my article, I want to leave you with three of my favorite quotes about the noble lie of rehabilitation.

The first is from Hegel, who was, as you probably know, one of the founders of rational retribution. He said this about what true and humane retribution was and how it is much more just than ineffective rehabilitation. He said this: "Punishment is regarded as containing the criminal's right, and hence by being punished, he is being honored as a rational being. He does not receive this new honor unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is either treated as a harmful animal who has to be made harmless, or with a view to deterring him and reforming him."

The second quote is from the American Friends Service Committee, the Quakers. Because they invented the penitentiary, when they blasted rehabilitation in 1971, people listened to them. Here is what they said: "When we punish the person and simultaneously

try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time.” And I would add that we hurt him even more when we tell him he has a disease and then we send him to prison when he does not respond to our treatment of him.

I think Frank Allen said it best in his anti-rehabilitation lectures that he gave at Yale in 1979. He said this: “Some paradox of our nature leads us, once we have made our fellow man the object of our concern, to go on and make him the object of our pity, then the object of our wisdom, and then the object of our coercion.”

Martin Karopkin*Kings County Criminal Court*

I, too, have done a little thinking about today's topic and how it relates to punishment. I am reminded, as I think about therapeutic jurisdiction and problem-solving courts, of Gilbert and Sullivan, who came up with a little ditty called "Let the punishment fit the crime, tra la, let the punishment fit the crime." That really has been, it seems to me, the traditional notion of punishment, an attempt to do something meaningful with criminal punishment, from early on, from "an eye for an eye, a tooth for a tooth," to more recently perhaps a judge here in New York City sentencing somebody who graffitied our subways to go clean subway stations.

As one of the speakers earlier today said, what has happened is there is a shift and a new paradigm. It might be reflected as follows: let the punishment fit the defendant. Well, that could be pretty troublesome by itself, unless you add some qualifiers. In an appropriate case and with an appropriate defendant, it is perfectly reasonable, it seems to me, to let the punishment—hopefully it is in the form of treatment—meet the defendant, and hopefully it will have better recidivism statistics and will reduce the level of crime and improve the life not only of that individual but the others that he might otherwise victimize.

But I am not here to discuss the merits of therapeutic jurisprudence or other things. My notion, or the subject that I am most concerned about, is mentally ill criminal defendants.

I must say when you speak about mentally ill criminal defendants, you have to bear in mind that mental illness is just that, it is an illness, and many of the people caught up in our criminal justice system are there largely because of that mental illness. When we incarcerate those people, we are penalizing them for their illness.

The notion of dealing with mentally ill individuals in the criminal justice context is a fairly new one, and it has come up in two ways. One is in the notion of mental health courts—that is, courts specifically designated and designed to deal with mentally ill defendants. The other is the notion of having mental health services available to courts generally and take them out of regular courts and provide them with service providers and programs that are designed to identify and treat those individuals. There is, frankly, an ongoing debate as to which is the better way to go with mentally ill criminal defendants.

I am privileged to have had the opportunity to hand out as part of the materials for this class today a brochure about "Rethinking the Revolving Door." It is put out by the Center for Court Innovation, which works with our own New York State Office of Court Administration. I was privileged that they allowed me to hand these out today. I am only limited to a few minutes here, but a very in-depth report of this is done in that brochure, and I recommend that you read it.

What I have been trying to work on is, first of all, a program for mentally ill criminal defendants in the context of a misdemeanor court. You have already heard from other speakers how difficult it is to get a misdemeanor diversion program to work because of the lack, as was described earlier, of a hammer. It is very easy to get somebody who is facing multiple years in a state prison to think about going into treatment. It is very difficult when you are looking at somebody who is facing either a very short jail sentence or some community service as an alternative to think about treatment instead of those options and alternatives. It is hard to convince defense attorneys that that is the best way to go. So those are some of the problems.

And, of course, as you have also heard, it is much more difficult to deal with mentally ill individuals than it is even with drug addicts, who are themselves a difficult population.

Let me tell you a little bit about how I got involved in this. There was some talk earlier about gestation and birth of programs. I also have what I think is an interesting story about that. I had been sitting in the night arraignment court in Brooklyn, which is the big intake part. Almost every case in the criminal justice system, misdemeanor and felony, comes through our arraignment part.

I was approached about four and a half years ago by two people interested in mental health issues. One was Dr. Stacy Lamon, who is with the New York City Department of Mental Health, and the other is Heather Barr with something called the Urban Justice Institute. They asked me if I thought I could set up, or would be interested in setting up, a program to deal with mentally ill criminal defendants. At the time, I thought, "Yeah, there is a handful of people and we will be able to deal with this, no problem."

Then I started to study what was going on and discovered that, in a study done by the Federal Department of Justice, some 16 percent of prisoners in state prisons and jails are mentally ill. Mentally ill people are five times as likely to be involved in substance abuse,

one of the things that brings people generally into the criminal justice system. And there are other statistics to show just what brings large numbers of mentally ill defendants into the system.

The first thing we did was to do a study. We believed that more than twenty percent of the individuals coming through our arraignment courts are mentally ill, seriously mentally ill. What we have done as a result of that study is bring into the night court a psychologist and a social worker who are on staff at night and are available to screen people waiting to be arraigned to determine if they are mentally ill, and then to work with me to see if we can work out some kind of a disposition of their misdemeanor case which would include an opportunity for them to receive treatment.

The alternative, at arraignment particularly, is whether somebody will walk out the door without bail or with a non-jail sentence, or whether they will receive a jail sentence or bail will be set and they go into prison.

There is a very strong pull when somebody you know is mentally ill to send them to jail, either to keep them off the streets and prevent them from doing something horrid, or to get them treatment, hopefully, through the jails, which does not work. Putting them out on the street without any control also does not work.

What we have been able to do with the psychologist and the social worker is to establish a system where I can let somebody out, put them back into society, but not onto the street. They go to a shelter, they get a full evaluation the following day, and then they go into a treatment plan. That to me is a tremendous relief, that I do not have to put somebody in jail and that I am not simply putting them loose on the street and they are getting treatment.

We have some preliminary numbers as to how well this is working. This is about the way it pans out. Of the people we have put into the programs, about seventy percent have complied. That means about thirty percent have left the system and we have to deal with their noncompliance. But seventy percent have complied.

Of the seventy percent who have complied, ninety percent of those have continued, completed the program that we established, and, after the court monitoring period was over, have continued on with the treatment plan that we set up. This to me is the most encouraging thing that I have seen about this program so far. Those who do the program and complete the monitoring period, which can be thirty, sixty, or ninety days, most of those people continue on with mental health treatment that we have put them into.

So I can't be more encouraged by that, and I can't tell you how strongly I believe that this is a valid and appropriate use of the court system, the court time, and of society's resources

Marilyn Roberts*Department of Justice*

My perspective comes from my job at the Justice Department. It is one as director of a grant program to support drug courts. To set the record straight, this grant program was never created to support drug courts for their entire life. It is a discretionary grant program. It is a demonstration program. Part of the authorizing language requires that applicants have a plan for how they will support the drug court after the grant is completed. The grants were always intended to be seed money for drug courts, and it was felt that if the program was successful and it was something that was useful to the community, that then the community and the state and the other sources of funding would kick in, as well as some other federal sources that are available to support drug courts. So there are multiple funding streams available to drug courts.

In talking about the evolution, I thought I would talk specifically about the evolution of drug courts because it is the problem-solving court that I am most familiar with. So my perspective comes from seeing a lot of drug courts from the national perspective and having a little bit of history based on the people that I have worked with.

I have seen at least a hundred drug courts around the country, and my staff has seen hundreds in the course of monitoring the grants that they are responsible for. We have watched them grow. We watched them develop.

We have had the privilege of meeting wonderful people around the country. Drug court practitioners are enthusiastic beyond belief, they are forward-thinking, they are innovative, they are generous. They are really a wonderful group of people and I consider it a real privilege to be able to just hang around them sometimes.

Drug courts began in 1989 in Miami. The first drug court was in Miami. I think that the first treatment drug court was in Miami. There were drug courts before that that were really a response to the War on Drugs. The War on Drugs—I guess not in Denver, but in other places—was a movement to arrest more drug offenders, and it didn't have anything to do with treatment drug courts. It just had to do with arresting drug offenders.

I think the state court system's first response was to separate those cases out, start doing case management on this huge number of drug cases that were coming into the courts as a result of the

increased number of arrests. So the first response was: let's separate them out, let's dispose of them as quickly as possible.

We started in the 1980s to have things called something like "rocket docket" and things like that, which were what the first drug courts used to try to process cases. Well, lo and behold, once these cases kept coming and they kept being processed effectively and disposed of, judges started to realize they were seeing the same folks over and over again because they were the folks who were addicted to drugs. So that was what I believe the Miami Treatment Drug Court was responding to in that community.

A couple of presiding judges there, Judges Weatherington and Klein, did some thinking, did some traveling, and came up with the idea of the court in Miami. They went to their City Council and got agreement for \$10.00 on every traffic fine to fund their first Drug Court there. Then they enlisted the help of a crusty former cop, former prosecutor, former defense attorney, Stanley Goldstein, to be the judge of the Drug Court.

There were a couple of other important people involved in terms of how I look at it. My former boss, then District Attorney in Dade County, Janet Reno, was involved in planning, and my good friend and also former boss, Tim Murray, as well was involved in planning and administering that first Drug Court.

The whole idea of a drug court is, as you have already gathered, to deal with the addiction that is causing the problem, rather than just to deal with the crime that occurred as a result of the addiction. Instead of disposing of the drug case expeditiously, the Drug Court judge orders a drug-addicted offender to treatment and then uses his power to keep that person in treatment as long as it takes to try to get better and to learn to change their behavior.

From that single Drug Court in 1989, we have come to nearly 800 drug courts around the country and another 450 in the planning stages.

Looking back over the last twelve years, I think we can say with certainty that drug courts have certainly changed the lives of thousands of offenders for the better. They have become clean and sober, maybe not forever, as we have all talked about, but they have become clean and sober. Then, just as important, and perhaps more importantly, they have learned some new life skills and have become productive members of the community.

I am in an environment where people always talk about, "Yes, but can you tell us about the recidivism data for drug courts?" But I also know that you can look around and you can talk to drug

court practitioners and they will tell you about other successes of drug courts in addition to recidivism data. They will talk to you about drug-free babies. They will talk to you about people who have gotten jobs, not just flipping burgers at McDonald's, but have actually learned a vocation and learned to support themselves, pay taxes, have gotten caught up on their child support for the first time and are paying child support.

You even can talk to drug court practitioners who have used the drug court opportunity to make their court systems operate better. They actually are getting people from arrest to some sort of disposition in a relatively short period of time, as opposed to appalling time periods before the Drug Court started, things like thirty, sixty, ninety days. So people are using drug courts as an opportunity to improve the way their court actually functions.

I think there is still a lot to learn about drug courts, there is still a lot of research to be done, there is a lot of data to be gathered, but I think that there is a growing body of research—and the researchers who are here will tell you about it—that is telling us that participants in drug court programs have a reduced criminal activity while they are in the program and for at least some period of time upon graduation. I do think we are beginning to see that on a national basis.

Drug courts have moved from a local response in one jurisdiction to a national phenomenon. It was originally designed to be a program that addressed drug-abusing adult offenders. We now see drug courts have been adapted to juvenile populations, to DWI/DUI populations, to tribal communities, and most recently, as Judge Sosa-Lintner was talking about, to the civil side with dependency cases.

Drug courts have gone from being referred to as “boutique” courts to being worthy of an American Bar Association Standard on Drug Courts for the Trial Court Standards, and to being recognized by the state court leadership around the country as an approach worthy of integration into the mainstream court system.

I have talked about where drug courts have come from and where they are now. Where should they go? There are people who like to talk about more drug courts. I really would like to talk about more drug court clients. Most of the drug courts around the country are dealing with maybe fifty people, up to 200 people, in their drug courts.

I think if we believe this is an approach that is worthwhile, and I do believe that this is an approach that is worthwhile, I think we

want to look to courts like San Diego Juvenile Court, like Minneapolis, to the Brooklyn Treatment Court that has a large-volume caseload.

We need to look to thinking about how to reallocate resources and use this approach for all the offenders for whom it is important or for whom it will be an effective way to use resources.

I want to emphasize reallocation of resources, I want to emphasize multiple funding streams, because drug courts cannot exist on a federal grant. They cannot exist on any one funding stream. There are multiple resources that have to be brought to bear to make a drug court work.

The really hard part about drug court has been alluded to earlier today, and that is a team approach. A group of people who are not trained to work together learn to work together and they learn to communicate. That is the hardest thing about a drug court, is the team and the continued communication, and that is very hard to maintain over time. So if drug courts are going to continue and this approach is going to be continued, that is the hard part, is to keep the team working together and communicating and sharing information.

Bruce J. Winick

University of Miami School of Law

I would like to talk to you today about therapeutic jurisprudence and problem-solving courts. Problem-solving courts is a relatively new, emerging development in the judiciary, and I think a very exciting one. As you have heard, it really perhaps started off in Miami Dade County in 1989 with its Drug Treatment Court, but it certainly has expanded beyond that to a number of different kinds of courts, including domestic violence court, mental health court, and dependency court, and the newly emerging community courts.

Yet, this is a movement that I think has largely been atheoretical, and in a way I would like to offer therapeutic jurisprudence as a theoretical grounding for this developing movement. I would like to, in effect, situate this movement within the context of the scholarly approach that David Wexler and I call "therapeutic jurisprudence."

We started this work in the late-1980s, around the same time that the people in Miami were thinking about how to deal with drug problems in a different way. Basically it started off in the area of mental health law. It was a fairly academic, scholarly approach that Wexler and I originated. It was one that kind of looked at the law, rules of law, legal practices, and the roles of various legal actors like judges and actors, that looked at the rule of law as a therapeutic agent.

In effect, law, whether we know it or not, is a social force that has inevitable consequences for people's emotional well-being. Sometimes those consequences are negative. Sometimes they are positive.

Our conception was that we should study the law along this dimension, that we should use the tools of the behavioral scientist to examine law's impact on people's psychological well-being, that we should critique the law when it was anti-therapeutic, and when consistent with other strongly held values that the law obviously does hold, that we could see if the law could be reshaped to make it into more of a healing force, a therapeutic force.

And so, in effect, it was an interdisciplinary, scholarly approach that had a lower-form agenda. That movement looked at various issues of substantive law, not only in mental health law but over the years in family law, juvenile law, criminal law, tort law, even commercial law and contract law. In effect, it has emerged as what I

would call sort of a mental health approach to law generally that looks at the law in a different way.

And again, let me emphasize that we do not mean to suggest that the therapeutic dimension is the most important one served by law. Law serves many aims and many ends. But what we try to do is interject into the policy analysis, the balancing that law is all about, this previously understudied and un-thought-about dimension, how law can function to help people in regard to their psychological well-being.

The work, again, started off largely looking at rules of law, but the more recent work has looked at the roles of various legal actors. How judges act in their courtrooms can have an impact on the mental health of the people affected. How lawyers act across the desk from their clients can have a similar impact.

Our basic notion is let's understand that, let's be conscious of that; and once you are conscious of the fact that as a judge or as a lawyer your actions will have these effects, then what we are suggesting is let's take that into account in reshaping your own actions and activities.

Basically then, we are kind of seeing the law as an instrument for helping people. Again, it is one value served by law, maybe not the most important. And problem-solving courts obviously are involved with seeing how judicial practices and the roles played by judges can help people deal with their problems.

And of course, as we have heard, many of the problems that come to court are the product of substance abuse or mental illness or other dysfunctional kinds of behavior. People do have problems.

In effect, our society does not do a particularly good job of solving those problems through prevention, through allocation of resources, and the like. I wish it were otherwise, but it is not. So, as a result, we really dump many of those difficult problems at the doorstep of the courthouse.

And I suppose the courts can go one of two ways. They can sort of turn a blind eye to the origins of those problems and just deal with the criminal charge—or with the symptom as it were. Or they can look a little deeper at the individual that is appearing before them, can look at the individual holistically and see the nature of that problem, and see perhaps there is a way of resolving that problem that will prevent future problems of this kind, future court involvements.

In effect, problem-solving courts obviously go down that road, out of a recognition, I think, that we have not done a particularly good job of dealing with problems of these kinds, that in effect the criminal court, the way it used to deal with drug cases, for example, was a bit of a revolving door, that people with mental illness who act out in ways that get them in trouble with the law in minor offense kinds of ways, like loitering or trespassing or urinating on someone's lawn, they do not belong in jail, if their real problem is an underlying mental health problem that needs treatment.

I guess the question is: How can judges function, how can courts function, to help solve these difficult problems?

"Is this an appropriate role for the courts?" Judge Hoffman raises? I think it is. It is not the only role, and it certainly is not the most important role when the judge is acting as fact finder, deciding historic issues of fact in a disputed adversarial hearing.

But many of these cases are not dealing with disputed issues of fact. In many instances, there is no question about the individual's criminal liability, or the fact that they have mental illness, or the fact that they have a substance abuse problem, or the fact that they are abusing and neglecting their children, or whatever.

The question is: What are we going to do about it? What can we do to help avoid the repetition of those problems, to help rehabilitate people when they need some help? I think it is in that dimension that problem-solving courts give us some great promise, and I personally applaud this new direction.

In effect, problem-solving courts are trying to deal with these problems that have come, as I said, to the doorstep of the court. The court is really functioning in many ways as a psycho-social agency in these contexts. When it is asked to deal with problems of drug abuse or alcoholism or even divorce, child abuse and neglect, mental health problems, the court is functioning, whether we want to think of that or not, as a psycho-social agency.

I think what that means is that we have to, as lawyers, understand a little psychology and understand some principles of social work. I know when I give this talk, some judge in the back row always says, "But I am not a social worker." And my answer is, "Yes, you are when you are dealing with these kinds of problems, and you are either going to be a good social worker or a lousy one, so get with the program and increase your effectiveness."

Now, what does therapeutic jurisprudence have to offer these newly emerging problem-solving courts?

We look at the psychological and social sciences—we mine those fields, as it were—to come up with pieces of doctrine and analysis that are useful to being imported into the law. There is an already large existing body of literature in the therapeutic jurisprudence arsenal, many books and over 400 articles. What we are suggesting is that we have looked at problems of how, for example, judges can deal with issues like denial, when the individual before you is in denial about the fact that perhaps he has a drinking problem.

We have dealt with issues about how judges and lawyers can increase their interpersonal skills, can learn to be better listeners, can give the individual a sense of voice that is empowering, and validation, can treat them with dignity and respect, can act in ways that can harness some basic principles of psychology and social work, that can make the functioning of the judge much better, that can help the court play this newly emerging role as really therapeutic agent.

Do I think that the courts should be paternalistic? No, I really do not actually. I think that the concept of therapeutic jurisprudence might suggest that. But, interestingly, I myself and Professor Wexler have criticized paternalism. Paternalism does not always work. It is good to give people choice.

Am I for coercion? Not really. I think the individual, for example, in a drug treatment context is in an inherently coercive context. They have been charged with criminal charges for what they have done. They have some degree of choice: they can face their charges, they can plead not guilty and go to court, or they can plead guilty and seek the best sentence they are able to do, or they can face their problems and go through the door, let us say, of the drug treatment court. I think it is very important that we make it clear to that offender that that choice is voluntary, because if we do that, not only will that comport with our concepts of due process, which we firmly believe in, but it will be more conducive for a better therapeutic response.

People do not respond so well when they are hit over the head and coerced and treated paternalistically. They respond much better when they are given a measure of choice, when they can feel that this is their intrinsic motivation rather than something that is imposed extrinsically on them, when they can set goals for themselves which set up self-fulfilling prophecies in a way.

These are psychological notions. I know in the past we have not taught a lot of these psychological notions in our law schools and to judges and in continuing legal education, but I think we need to do

a lot more of that, just as judges dealing with antitrust cases need to understand some economics or judges dealing in patent cases need to understand some engineering. Judges in these contexts are dealing with human problems, and they need to understand some principles of psychology and, in effect, understand that how they act will have an inevitable impact on the ability of people to be rehabilitated or not be rehabilitated, that they are now therapeutic agents.

So I think that therapeutic jurisprudence has much to offer this developing model of problem-solving courts. It is a good model, I believe. It is one that is a humane and human one. It gives the law a human face. We need to help people. We need to help them solve their problems. And, of course, courts have always done that, and I think now they are beginning to do it with newer tools.

Lisa Smith*Brooklyn Law School*

I am going to try to move very quickly into practical problem solving in the child abuse and domestic violence field.

You know, it is fascinating to be here, but I think actually for me the most fascinating thing about it is to actually hear the words “problem-solving” and “court” in the same sentence, actually attached to each other, because in the 1970s and the 1980s, and even the early-1990s, numerous problems existed in the criminal justice system, as they still do, and lawyers, even when they were adversaries, always referred to the court as “the problem,” not as the “problem solver.” Most of the time, the people said that the court cared about nothing substantive, cared only about statistics, crunching numbers, and clearing calendars.

I often thought, even in those days, about what the problems were and how turning around the problem could actually positively impact on crunching those numbers, on those statistics, and clearing the calendar, if only somebody would take leadership and attempt to come up with some creative solutions.

The advent of the judge becoming a part of that is really an interesting part of problem-solving courts, because things have obviously changed dramatically. What we are hearing about on this panel and at this conference is from people who saw a problem, a problem that repeated itself day after day after day, and instead of sort of sitting in the bar or the diner somewhere talking about it and complaining, actually got together and, instead of saying “No one cares and nothing changes,” sat down, wrote a project, and changed a policy.

The project I am going to talk about is not a court actually that itself was created to solve a problem. It is about how several judges and court system personnel and lawyers got together to solve a problem that was making their work very difficult.

I got involved because I handled many, many child abuse and domestic violence cases, and the final case that sort of just was the catalyst for me was a domestic violence case in which a woman named Amy came into my office. She had been harassed by her boyfriend. In the course of talking to her about her case, she was talking to me about her life. She was thirty-six years old and she told me that she had had three husbands, all who had died, one in Texas, one in Michigan, and then the last one in Brooklyn. I have

to say actually, as an aside, as a prosecutor, that sort of concerned me a little bit, because that is an awful lot.

But in any event, aside from that, my other concerns were that her last husband was thirty-five years older than she was and she told me that he had been a vice president at Paine Weber or J.P. Morgan or something. She said she had twin daughters who were six years old that she had with him—I don't remember if she said in-vitro or artificial insemination, something.

Now, she clearly had alcohol issues in my office, and she sort of admitted to them, and I thought she looked like she had drug issues too. Then she told me that she was home schooling the girls. I knew a little teeny bit about home schooling, and I just asked her, "Well, what is the home schooling plan," because I know the Board of Ed generally asks you about a home schooling plan, and she really didn't have one.

So apart from dealing with her as a victim of domestic violence, of course I was very concerned and wanted to contact ACS, the Administration for Children's Services, about this family. Now, I had gone through this many times before, but this really seemed extremely important to me, this particular case.

Of course, I went through the usual numerous phone calls back and forth, back and forth, and days and weeks and a month went by, and ACS did occasionally return calls—this is not about blaming ACS, because they were very busy—but I just never got the information I needed.

The domestic violence case resolved itself. Eventually it did, but it took a very long time, really an unconscionably long time.

The information I eventually got, which I wanted day one, which I should have had, was this. I finally got a report from ACS that said: "The home is described as hazardous. In the home there is dog feces all over the floors and on the clothing of the children, dirty dishes are everywhere, and there is a wooden coffin in the living room where the mother stated she will be buried. The mother is very bizarre."

The project that I am going to talk about a little bit speaks to this issue of the lack of coordination and communication between the court systems in New York.

In 1999, there were about 120 child abuse felonies and about 500 misdemeanors that were in the Kings County District Attorney's Office. Now, every one of those cases generated a child abuse report to the Administration for Children's Services.

Now, those reports commence actions by ACS, whether they investigate the home; they sometimes have to remove the children immediately, sometimes they remove them to just other care situations; and of course they also begin a Family Court case. Now, some of them are resolved as unfounded by ACS. Some are founded and require that assistance be sent to the home. Programs for the parents are created so that the family is intact. Now, some require absolute removal because of pervasive physical and sexual abuse.

Each case has an ACS case worker and almost all are pending in the abuse and neglect parts in the Family Court as well as in the Criminal Court. Now, we all know that this is a common situation in domestic violence cases and it is also common in child abuse, but it is virtually unheard of in the rest of the criminal justice system.

Now, the prosecution of the criminal cases before the judges—and I am sure some of the judges here would actually say this—degenerated into the following conversation every single day, because I participated in them.

The judge says, “What is going on with ACS?”

The prosecutor responds, “I don’t know.”

Then the judge says, “Well, who is the Family Court judge?”

The prosecutor says, “I don’t know.”

Then the judge says, “Well, where are the children? What is their care situation?”

The prosecutor says, “I don’t know.”

Then the judge screams, “Didn’t I tell you last week to bring me this information?”

The prosecutor responds, “I tried. I really tried, Judge. I made all the phone calls, but I couldn’t get the information.”

And, of course, the scenario ends with the judge screaming in frustration.

Now, at the same time, in Family Court, I know from all the lawyers at ACS, the Family Court judge is screaming in the exact same way at the ACS workers and their lawyers, because that judge is saying to them, “What is going on in the criminal court? Who is the Criminal Court judge? Is there a plea? Was there a trial? What is the DA’s office intending to do with this case?” And, of course, the lawyers in Family Court are responding that same very efficient way, “I don’t know, I don’t know, I don’t know,” which of course made the judges crazy.

Now, there is no simple solution while the courts remain to this day independent, non-technology-linked entities in need of a great

volume of information from each other. But a number of the judges finally pushed a lot of the parties, and a number of the parties came together to do this, and they sat down and tried to create a project to deal with the problem

The first thing that the court did was to draft a list of the information that it needed. It was just the typical things. Just an example: who the ACS case worker is; is there a pending Family Court case; what was the Family Court finding; who was the judge; prior history with ACS—obviously very important; where are the children; what is the foster agency; what are the orders of protection; and what kinds of services are ordered, are they in compliance, and what is the time frame. A court information sheet was created to include all of this information and much of the Criminal Court information too.

Now, obviously, the primary issue for the Criminal Court was the lack of communication between ACS and the Criminal Court, and of course this was being attempted by hundreds of phone calls that went back and forth unanswered. And the issue for the Family Court was the inability to get the necessary Criminal Court information about the prosecution of the case. Their ACS workers made those same hundreds of unanswered calls.

The process went through many stages between all of the parties. First, we attempted to connect the computer systems, which wasn't going to work. Then, we tried to get the courts to hire court liaisons for both courts. But eventually, agreement was reached and ACS actually hired an employee who would then get a case list from the DA's Office, their Child Abuse Unit. That employee, using the internal ACS computer in which their case workers inputted all of their information, filled out the information sheet. The information sheet would then be e-mailed to the judge in the Child Abuse Part, who would then provide copies of it to both the prosecutor and the defense attorney at the court date. The ACS employee then updates the information sheet at each Criminal Court appearance so that the judge can know what is going on in the Family Court and vice-versa for the Family Court judge.

It is also possible to e-mail this liaison and ask them to update you with information. So presumably on my coffin case, if this had existed, I would have simply been able to e-mail this person and straighten this out.

The project has benefitted Family and Criminal Court by avoiding unnecessary adjournments which were only calendared because of the lack of information between the two courts, and of course

that translates into a saving of time and resources. It allowed the liaison to provide information to ACS which decreased, very importantly, the frustration of the families with cases pending in both jurisdictions. And it greatly reduced those constant phone calls.

The judges in those courts saw a problem, they pushed for a solution, and they changed the ability of the Criminal and Family Courts to more effectively deal with child abuse.

Questions and Answers

QUESTION: Thanks for participating. My question—well, I want to lead into my question by saying that I am glad you mentioned ACS and the fact that ACS, probation and parole, prosecutors, defense attorneys—they are all adversarial to one another, so it is really hard to get anything to the judges when everybody is fighting each other beforehand.

Dealing with ACS, my question is: When you talk about treatment and court innovation—treatment is also going through innovation too, because they are learning right along with everyone else. Unfortunately, we've only got about—well, it is hard to get a number, but I will say less than a dozen treatment centers that are holistic, that treat the children and the parents at the same time.

So when you offer a woman, let's say—I'll use women because mothers are still the primary caregivers of the families—if you offer a woman \$1 million but the way she gets the \$1 million is to give up her children, she is not going to take the \$1 million. So if you are offering her treatment but she has got to be separated from her children for a year or more—or I don't care if it is three months, whatever amount of time—she is likely not going to take that option.

So I want to know—my question is: What are you doing, or can you do anything, are you doing anything, personally, privately, professionally, to see that treatment options like this are more available?

JUDGE GUBBAY: Let me just try to respond. I think you raise a critical issue which can be expanded, that the defendant has to be married to an appropriate program. If the program is not appropriate, then it is not going to work. So if you have a Spanish-speaking defendant and the program is not a Spanish-speaking program, you are not going anywhere. If you have a mother who has a young child or an infant and is going to be separated from the infant, you are not going anywhere. So that is the challenge and that is the goal.

The resources for the kind of program that you are contemplating are much more significant, I think, than a lot of the other treatment providers.

But you are right. There needs to be that kind of program. And I know that there are not that many of them because I have encountered female defendants who have very young children, and that is all they are thinking about. They are not thinking about treatment; they are thinking about housing. They are not thinking

about treatment; they are thinking about care for the kid. So I think you raise a very important issue.

MS. ROBERTS: I just wanted to follow up on that. I agree that is a really important issue and I think that is the real challenge for these kinds of courts that are dealing with people who have huge problems, not just that there are substance abuse or there are mental health issues, but they have every other issue you can think of, like need for primary health care, need for housing, need for education, need for a way to take care of their children.

I think that is primary to making this all work, is finding the programs and creating more of the programs that work well for the criminal justice population.

QUESTION: I think that there is no ideal way of dealing with that problem, but I think, since I have been—there are only two fully operational family treatment courts in the whole state right now. We have many, many at the beginning stages or starting stages, where they have a case load.

The beauty of the treatment court is having the court coordination of the services via the case managers in the court. So that you may not find the ideal mother/child program, but you will find a program that will treat the parent and provide some services for the child if the child is at home, or if the child does not need services—not every child needs services other than day care—they will provide day care for the child, or they will find a program that has at least a day care component—it's not a treatment, but it's a day care component. And always meeting very regularly with the case managers in case that particular program doesn't work.

Unfortunately, we still are dealing with the situation that ACS does remove most of the children in these drug cases because drugs are not the only issue. They are the coffin in the household. They are the feces all over the household. There is the home schooling by people who don't have any education, so you have educational neglect. They are the kids with the rotten teeth. They are the kids that need psychological treatment and the parent has not gone to have the child evaluated. So drugs is not the only issue. So a lot of the kids do get removed. So the parent will go to treatment on their own.

What the Family Treatment Court does is to increase the contact that the parent has with the child. We grant a lot more visits, a lot more quality visits, to that parent, and parenting skills, all together. We don't say, "You have to finish your drug treatment program, then you have to do your parenting skills." They have to do it all at

once, and that is what makes it very onerous, but it is an essential program, I think.

QUESTION: I would like to address a question to two of the issues that were raised by the judges on the panel.

The first concerns the whole issue of coercion and how coercive drug courts are and whether or not it is appropriate to use coercion in that manner.

One of the major criticisms of the Rockefeller drug laws in New York and other mandatory sentencing schemes is that they create an environment where the punishment that the defendant is facing is so severe and so harsh that most defendants end up pleading guilty to a lesser charge in order to reduce the amount of time that they are required to serve in the prison.

I do not understand why offering people treatment as an alternative to incarceration when the outside punishment that they are facing is the same is in any way less coercive. It may be a better outcome for that individual, but I do not get that it is any less coercive. The suggestion that somehow these people are engaging in exercise of free choice I think is a dubious one and one that should be examined before it is just accepted by people, particularly since in our society—and this is my other point—has to go to the fact that nowhere in this discussion this morning has there been any mention of the notion of race or class as having an impact on this whole issue of therapeutic jurisprudence and who is being made the subject of this new judicial innovation.

I do not think that the statistics in the other states that court judges are representing are much different from New York, and the fact that the majority of the people who are coming into the courts facing these charges are overwhelmingly poor people and people from minority groups, for whom access to treatment is limited by both their racial and class distinctions, such that they do not have free access that other people have to getting help on request or on demand or when they are ready for it.

And so, to discuss this without discussing the implications and the dimensions of race and class and the fact that this is not equal law enforcement, this is law enforcement against those people who are already the most marginalized members of our society, is something that we should be talking about.

I am asking of these judges in their training to deliver therapeutic jurisprudence, that you are looking at your own cultural issues and the things that you bring to the bench and the attitudes that

you bring with you in dispensing justice to people under these circumstances.

JUDGE GUBBAY: I think you raise some very, very valid issues.

The first issue is in some ways related to what this woman raised, and that is marrying the program to the defendant—to the client, if you will—so that there has to be a cultural marriage, there has to be a gender marriage, there may have to be a sexual-preference marriage, there has to be a language marriage. It is a huge, huge issue.

I know that I participated in a year-long training process, and clearly I have a long way to go. But one of the presentations was the issue that you raised, and that is what does the judge bring to the table in terms of seeing the defendant before him or her and seeing that person as a human being, and what is the judge's language barrier in communicating to that person—and when I say “language barrier,” I mean it in the broadest sense. What other barriers are there? What cultural barriers does a white Jewish male bring in talking to a young African-American man and being able to communicate to that person?

So you are absolutely right, and those issues that you raise must inform this approach.

Two, on the issue of coercion, that's what everyone got. The arrest process, the criminal justice process, is unfriendly, is a charnel house. It is a machine that is unstoppable in many ways, and we as judges are presented with an impossible situation.

So how do we make the best of that situation? We have the power to coerce. We have the power to incarcerate. It is an enormous responsibility and must be used wisely. I think you are hearing from the judges at today's panel the need to temper that power with information, with compassion, with sensitivity.

But that coercive element, at least in the felony context, exists and it needs to be used in a positive way. It is our belief that by using the coercive element in a positive way, channeling the person to treatment and compelling treatment, is more humane than forcing them into prison.

My particular situation is somewhat different; in that the extraordinary jail sentence does not appear in Misdemeanor Treatment Court, so the voluntary aspect is much greater. And also to consider what Professor Winick was saying with respect to the voluntary aspect of participation in treatment, that it is important and that plainly no defendant has to take Drug Treatment Court.

If the defendant wants to opt out—I see you smiling, and I know why you are smiling—but if someone does not want it—in fact, in the Misdemeanor Treatment Court, you’ve got to want it on day one, the latest day two, or you are out and you’ve got to go the regular path.

JUDGE HOFFMAN: Let me respond, first, to the question about coercion. This is utterly and completely coercive. In fact, that is what the proponents want it to be. I mean, that is why they think it works, is that we have the attention of these people, and now finally, now that we have their attention, maybe they will respond to treatment. The reason we have their attention is exactly because this is completely coercive.

The drug court model in Dade County, and in Denver, and I think in the traditional pre-adjudicative drug courts, is that these defendants do not even get out on bond until they agree to have pre-plea drug treatment. So these defendants have this choice. It is not just a choice about ending up in prison or doing drug treatment. The choice is getting out of jail today or having drug treatment before you are even arraigned. So there is no doubt at all that it is coercive.

What troubles me about the notion is not just that it is coercive on the front end, but that when the treatment fails, at least in the drug courts at my level, these people go to prison. I have written about this before. Drug courts perform what I have called “reverse moral screening.”

If drug use is really a disease, like tuberculosis, and if the people who do not respond to our treatment efforts are the most diseased, they are the ones that are going to prison. The people who use drugs as a recreational act, the frat boys in college blowing some coke, and the people who do not have this disease, they are the people who get caught up in the Drug Court net and do not end up going to prison. So not only do we have the same disparate results we have in all criminal systems, I think the filter treatment itself ends up with having more disparate results than any other part of the criminal justice system.

I have not looked at the data, but I would not at all be surprised if more people of color and who are poor end up in prison in drug courts than end up in prison in other traditional criminal courts.

JUDGE KAROPKIN: Can I just add to this just a little bit?

Obviously a very significant topic is coercion. In the area of mental health, that is a very special issue, because we want to avoid coercive treatment.

But I think what is raised here ultimately comes down to it is all in how you do it. That is what judging and good judging is all about. Obviously, it cannot all be solved that way, but that really is fundamentally at the heart of this.

If you take that power to put somebody in jail and you wield it like a stick, yes, it is going to be club-them-over-the-head coercive. The notion is to be—I think sensitive is the appropriate word—to the responsibility that goes with the power to put somebody in jail.

Fundamentally what you have to do is say: “Look, there is this criminal justice system that has existed before, we haven’t tampered with that,” and I think that is one of the problems I have sometimes with the notion, or with the term at least, “therapeutic jurisprudence,” because we really are fundamentally a court system, so that you should be able to have a trial, you should be able to have a suppression hearing if charged with a drug case, you should have all of the legal rights that go with you ordinarily as a criminal defendant, and they should not be encumbered in any way by the existence of the treatment alternative. And that is just what it should be, an alternative.

So I think the notion of coercion is one that judges have to be particularly sensitive to. Is there adequate training on that? I don’t think so. I think we really need to spend more time on addressing and understanding this issue of coercion.

PROFESSOR WINICK: Let me try to elucidate a little bit this notion of coercion by suggesting that it is not just a descriptive concept; it is kind of an evaluative concept.

We use the word “coercion,” I think, to condemn choices that we think are somehow unreasonable in the circumstances, or pressures that we think are unreasonable in the circumstances.

Let’s say a heart patient goes to the doctor and the doctor says, “Boy, you’ve got a bum ticker, you need double bypass surgery, here’s the pros and cons.” That patient has to make a choice. Is that an uncoerced choice or a coerced choice?

In a way, none of the choices we make in life are totally voluntary, totally free of coercion. There are pressures all around from a variety of different perspectives. The question, I think, is whether they are unreasonable perspectives.

And I do, by the way, think the Rockefeller drug laws should be repealed. I think they are regressive, too severe. I think they have been a mistake all along, and I think we should get rid of them. And obviously, people facing plea bargaining and diversion kinds of choices in the shadow of those laws have some tough decisions

to make. But so does that heart patient have a tough decision to make.

I think the point is this. I do not think that problem-solving courts are grounded in coercion. I would really disagree with Judge Hoffman in that regard. I think people do and should have, and should be reminded that they have, voluntary choice. They can face their charges.

They are in the predicament they are in because there is probably cause to believe that they have done the crime. Maybe they have not done the crime, and they certainly have a due process opportunity to show that they have not, if that is the case. But if they have done the crime, they are in a tough spot. But it is not a tough spot of the justice system's making.

The justice system should not manipulate that, to the extent that bail is manipulated, as Judge Hoffman suggested. I think that is wrong. I think we truly should tell people that it is up to them whether they go through a diversion program or face their charges.

Under the concept of coercion that I think the question suggests, plea bargaining would be unconstitutional, plea bargaining of all kinds. Yet the Supreme Court has upheld that, suggesting that unless it is an unlawful or an improper offer, it is not coercion, it is not legal coercion.

Remember, we are talking about coercion born of offers here, not of a gun pointed to the head or duress of that kind. The Restatement of Contracts, when it seeks to define when contractual offers are duress, again talks about improper offers, unlawful offers, immoral offers.

I do not think the offers we are making people in drug treatment court or in these other courts are any of those. We are giving people another option, another opportunity.

And let me say that coercion not only has a legal and philosophical but also, and importantly, a psychological component. It is a subjective concept.

What makes people feel coerced? The research on this suggests that if they are given a sense of voice, if they are treated with dignity and respect, if they feel that the individuals dealing with them are acting in good faith, they do not feel coerced, even if they are in a coercive context. By contrast, you know, they might feel coerced even if they are in a voluntary context when they are not treated that way.

Drug treatment courts and other problem-solving courts need to treat people in that way, need to give them that sense of voice and

validation, need to make them feel that they are being treated in good faith as fellow human beings.

And yes, your point about white judges dealing with racial and ethnic minorities is absolutely correct. What are we going to do about it? We need more racial and ethnic minorities on the bench, for one. We need to hold out more opportunities to the under-classes of our society for the other.

But we also, in the interim, until our sense of community can be restored, as I hope it will be at some point, we need to develop ways of talking with, relating to, dealing with people of other social classes. And again, psychologists have to face this all the time. This is a task for which we need to develop our interpersonal skills and our emotional intelligence.