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What Works and What Does Not

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MORNING SESSION

WHAT WORKS AND WHAT DOES NOT

PANELISTS

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I want to talk about treatment modality and participant progress in recovery. Most of my examples are going to be regarding drug courts, with just one other kind of court, the domestic violence court. Of cases handled in the Bronx Misdemeanor Domestic Violent Court, seventy-five percent are mandated to a batterer intervention program.

There are a number of other types of programs—substance abuse treatment, alcohol treatment, combined programs—that are available. For instance, one type of combined program, batterer intervention and alcohol treatment, is a function of the existence of the domestic violence court in the Bronx. Recently that program was determined to be poorly run, so that's no longer used anymore. So variables that may not directly relate to treatment, but relate more to the relationships between the court and available treatment providers may affect the modality used.

There are actually four New York City drug courts. This just gives the distribution of first treatment modality for those four courts. Immediately you see that Brooklyn and Manhattan are fairly similar. Both start out by sending about half of their participants to a long-term residential program.

Queens sends far fewer to a residential program, and when you look at other data about Queens, you see that they have a primarily young population, a population whose primary drug tends to be marijuana. So the clinical need is less, so they send fewer people to a residential program.

But then you get to the Bronx. Only four percent go to residential programs, eighty-five percent go to intensive outpatient. Well, that is not a function of clinical need. That is a function of the particular relationship between the court and treatment providers in the Bronx. In the Bronx, instead of referring out to a large number of treatment providers, they have a core of about ten to fifteen providers, all of which run intensive outpatient programs, some of which run other modalities.

But the dominant modality of treatment providers in the Bronx is intensive outpatient. Bronx courts tend to work very closely with these providers, so that the structural relationship between the court and those providers leads to an especially high degree of outpatient use.

I will just preview the results. If you were to look at retention rates across these courts, you could not necessarily conclude that one court is doing better or worse than the other based on modality they are using. But you would conclude that there are different types of relationships going on that are affecting the kinds of modalities being used.

Just to give a little bit of a overview of the other theme of the day that I want to talk to you about, I want to switch to the page that is titled "Graduate Compliance in the Brooklyn Treatment Court."

This is the other kind of necessity under treatment, that you have your modality, relationships between court and providers, and then in turn you have the participant response to that and their progress, not their outcomes but their progress, during the treatment and recovery process.

In this chart you see just the basic distribution of results for successful participants at the Brooklyn Treatment Court, and despite being successful—everyone represented in this chart is a graduate—only twenty-eight percent had zero positive drug tests during their participation; only thirty-eight percent had no unexcused treatment absences; and only fifteen percent avoided going out on a warrant.

Immediately you see that the recovery process tends to involve extensive relapses. And for any type of problem-solving court, that in turn raises the question of second chances: How many second chances are appropriate for the population you're working with? Are there types of third or fourth chances that are appropriate?

For instance, in this context in the Brooklyn Treatment Court, if there were no second chances, there would not be a particularly good graduation rate.

This sort of details the process a little bit more. This shows again just for graduates at the Brooklyn Treatment Court what their noncompliance rates are across five periods of their treatment: the first thirty days of treatment; between thirty and ninety days of treatment; after ninety days of treatment but prior to completing phase one of that program, which requires 120 days—and also, to complete phase one, that 120 days must be consecutive, drug-free, and sanctionless time—and then phase two and phase three.

Immediately you see, after just the first thirty days of treatment and a positive drug test, for an example, a tremendous improvement. After averaging a positive drug test on thirty-eight percent of tests in those first thirty days, immediately after participants are

past that point, you get tremendous improvement in level of compliance.

There is one final point I want to make about treatment and recovery process. That was just for graduates. We did an analysis where we looked at graduates and dropouts, and the question is, what is a warning sign that someone is about to drop out?

We found that positive drug tests were completely not significant as a warning sign that someone was going to drop out. Continued use was not important. What was important was attendance, commitment to the recovery process, that the participants who did not go out on warrants, who did not miss treatment appointments, tended ultimately to succeed, even if they had multiple positive drug tests, whereas the participants that maybe improved in their drug use but didn't have the commitment to the recovery process tended ultimately to drop out. The participants with absences tended to drop out. But positive drug tests were not at all an indicator that someone was headed ultimately to fail the program.

That's a very brief snapshot of two process issues that, by and large, have not been analyzed extensively but that give you a flavor for where I think the next five years of research is going to be in problem-solving courts, less focus on do they work—they are here, we all know that—and more on how the treatment and recovery process goes, what modalities are used, and what is the course of recovery.

Adele V. Harrell

The Urban Institute

I think the defining feature of problem-solving courts is the difference in the way they use legal coercion. Traditionally, courts have concentrated on using their authority to appropriately punish behaviors in the hopes that somehow that would deter future noncompliance. Problem-solving courts are really turning their attention directly on the subject of the offender's behavior, with less concentration on the appropriate penalty for the immediate instant offense.

I think that change means that problem-solving courts have had to rethink our normal approach to research.

Deterrence theory is what most criminologists immediately turn to when they think about using legal pressure, and this sort of posits that people choose to comply or violate laws based on their perceptions of the costs and benefits associated with the behavior. There are three main components: the severity of the penalty they face, the certainty with which they will face it, and how quickly they will face it.

There are two types of deterrents, specific and general. Specific means that if you give the penalty to the person, they won't do it again. General means that the imposition of penalties will discourage others. Drug courts actually use this when they have people come to review hearings and watch other people being penalized. That's their effort at general deterrence.

What does the research say about it? It says certainty is the key; severity of punishment is important but not always significant, and it may depend on the certainty of punishment and on the salience of the penalty to the individual; and severity has rarely been found to have an effect on offender behavior.

I think what problem-solving courts need to do is switch and begin to think about what psychologists or behavior management theory has to say about the use of sanctions.

Important insights from that literature are that there are actually four kinds of sanctions. There are two kinds of positive sanctions and two kinds of negative sanctions.

There are rewards, which in drug courts are in the form of tokens and recognition, judicial praise. There is positive reinforcement. This means dropping something onerous that is going to happen to the person as a reward good behavior, such as requiring less appearances in court or fewer drug tests.

There are also punishments, which are in the form of graduated sanctions, which are immediate responses or penalties to negative behavior. And there is negative reinforcement, and that is the imposition of the penalty for failing to show the good behavior; that is, imposing the alternative sentence.

I think it is important to begin to think clearly about the different types of sanctions, and document what we are doing in these problem-solving courts that works.

The other insights from that literature are that the salience of the sanction varies by individuals. For example, one of the things you see in domestic violence research is that arrest is a deterrent for some people, those who are employed, and not for others.

The other insight from that literature is that contingency management is very important.

The principles of punishment are:

A punishment must be severe enough to motivate efforts to avoid it.

Punishment should be consistent, and should consistently follow unwanted behaviors.

Punishments and negative reinforcement should be contingent upon offenders' behavior in a predictable and controllable way.

There are several implications for the way courts work. One is that this business of sending warning letters, for example, which is a first response to some drug court failures, may actually habituate offenders to the unwanted behavior because that's not very severe. So they get a free pass when they get a warning letter.

There is also an argument for making sanctions graduate in severity, because if the first one is not severe, maybe the second one is severe enough to motivate compliance.

Consistency is very important. Lab studies show that to the extent you deviate or give people free passes, it will actually discourage the learning or the emergence of the desired behavior.

With respect to punishments and negative reinforcements being contingent on offenders' behavior, not only do they need to be contingent but they need to be, from the offender's point of view, predictable and controllable.

That argues for the use of contingency contracts which spell out very clearly for your participant what the rules are, what they have to do to in behavioral terms very specifically. Such as they have to come to court, they have to go to the treatment program, not simply go away and be drug-abstinent or go away and go to treatment, but very specifically what they have to do.

Turning to the research on the effects of legal pressure, we see that there have been a number of studies that show that people who enter treatment under a legal mandate are more likely to stay in treatment, and stay in treatment longer. Review of long-term therapeutic communities, for example, showed this consistently. New York's DTAP program is an example. Mike Rempel's new analysis of Brooklyn Treatment Court data showed that people facing the most severe alternative sentence were more likely to enter treatment and complete the first phase of treatment, so that it was important in the treatment-engagement process.

Most of these studies are talking about negative reinforcement; that is, the consequence, the alternative sentence, that participants will encounter should they fail.

There is only one study that I know of that looked at graduated sanctions, which was our study of the D.C. Drug Court, which used penalties for specific behaviors. It was the only study that isolated the graduated sanctions or the punishment aspect of sanctioning.

It compared offenders who were randomly assigned to two dockets. In one docket, they got bi-weekly drug tests, lots of judicial monitoring, and encouragement to remain drug-abstinent. On the other docket, they got those same things and they were offered to join a graduated-sanctions program. Two thirds of participants chose to join the graduated-sanctions program, and this program spelled out in advance a set of rules. The rules specified that one positive drug test will result in the participant pending three days in the jury box; the second positive drug test results in three days in jail; the third positive drug test results in seven days in detox; and the fourth positive drug test results in seven days in jail.

These sanctions were applied with a great degree of consistency, so ninety-seven percent of the time, the offense was followed by the sanction, and most of the sanctions were delivered within a week.

What we saw was that the participants in the graduated sanctions program were three times as likely to test drug-free in the month before sentencing as those who were just getting judicial encouragement and drug testing.

I think that one of the lessons from that, though, was that when we did focus groups with the defendants, what they told us was that motivating them was the understanding up front of the behavioral rules of what they needed to do. The participants thought, therefore, it was an opportunity for them to show the judge what they

could and could not do. They also accepted more readily the penalties when they were imposed.

However, the analysis also showed a significant interaction between graduated sanctions and those who voluntarily went to NA and AA meetings, which on both of the two dockets they were encouraged to do. But the sanctions had a very positive interaction with that, so that combining the voluntary treatment with the sanctions produced the best result.

Overall, I think this literature has several things to say about problem-solving courts. One is that they need to use the full range of sanctions—rewards, positive reinforcement, punishment, and negative reinforcement—and they need to be consciously thinking about how they're using each sanction.

The psychology literature indicates, of course, that the positive reinforcements are much more powerful motivators of behavior than negative reinforcements.

Courts need to consider sanction salience. It needs to be sufficient to motivate compliance. I think courts have to worry about not using muscle and therefore making sort of a joke of the program. They need to be sure that defendants understand that the sanctions are contingent on their behavior. Signed agreements are good.

Rules need to be enforced consistently, and rewards need to be given when appropriate. There is a tension in problem-solving courts between having a very rigid sanctions schedule, like that used in Washington, and tailoring those sanctions to the individual to encourage compliance. I think that we don't know yet what the right mix is of how best to maintain an appearance of fair rules and consistent rules but also be able to work with an individual who is struggling with addiction, and I think we really don't know where to draw that line.

We need to demonstrate consistency in sanction review hearings that are attended by all participants.

The other lesson from psychology, which I kind of glossed over because I was rushing, was that extralegal sources of reinforcement for legal pressure are very important, very important. For example, in the Puerto Rico drug court, they require a family member to stand at the review hearings with the defendant and talk about the family's encouragement of recovery and disappointment when recovery is not forthcoming.

Jeff Fagan

Columbia University School of Law

For the past eighteen months, we have been studying the Community Justice Center in Red Hook, which is, for you non-New Yorkers, a neighborhood in Brooklyn, sort of southwest Brooklyn, which is physically and socially isolated, a very poor place, a long and rich history of both ups and downs, and a place that has pretty well been cut off from most social services and has had a history of government programs sort of coming in and going on.

That is an important backdrop, because it will explain a little bit about why this may or may not work. We don't know if it is working, and how we define "working" is an interesting question. But we're going to offer one theoretical perspective which will explain in part how we approached the question of "working".

It's more than just a problem-solving court; it's a community justice center. Community justice centers are very distinct from the kinds of drug treatment courts and batterer treatment courts and the like that we've heard about.

They are different in three important ways: They are forms of collective action by neighborhoods and citizens within neighborhoods, a set of reciprocal actions—what citizens do affects the courts, what courts do affects the citizens, what the citizens do affects the service providers, et cetera, et cetera.

One of the things that the community justice center attempts to do is to build a system of mutual accountability, which we think will ultimately leverage into a form of social control to reduce crime problems in the neighborhood.

Second, the court is in fact not just a court; it is a community program. It links service providers to the court; it links service providers to the families in way that are responsive to their perceived needs. It is physically and administratively closer to the social and behavioral problems that it seeks to address.

This is different than a problem-solving court. The physical stuff is not unimportant, it is extremely important, but equally important is that the court is now a service provider, a government agency in the community providing services. Some of those services are legal, some of those services are extralegal. How that works out will be an interesting question.

Third, the physical presence of the court in the community signals—and I use that in the Posnerian sense, for you law professors out there—that there are fact relationships of citizens to courts and

to communities that differ in meaning and tone and content from the typical relationship that you see downtown or even in the problem-solving court, which is located in the Central Court Building.

We are focused on Red Hook, and Red Hook is a poor place with a long history. One of the recurring crises in Red Hook, and many neighborhoods like Red Hook, is a crisis of the legitimacy of the law, whether legal institutions generally are legitimate, and we define legitimacy in a way that people basically—the high political theorists would talk about the consent of people to be governed by these agencies that attempt to govern them, and we won't go into high theory today.

But we do think that problems in distributive justice—in other words, fairness and procedural justice—meaning the way people are treated, in addition to the failure or limitations of government programs generally to provide public safety in places like Red Hook has created a breach between citizens and government. That breach is reflected in citizen reactions to government and to programs like justice centers and other government agencies in the community.

Simply put, historically the police and the courts have not been allies of the communities in their fights for public safety, or the communities don't perceive it that way.

One of the goals of a place like the Justice Center in Red Hook is to address this issue of role of law and legal institutions and how the law interacts with citizens to produce public safety by creating a court that is physically closer to the community. A court that is more responsive to the community's problems, those problems that give rise to crime.

By becoming more accountable to communities, one justice center offers the possibility of a transformative role for the center and a court that will involve citizens in the processes of social regulation and control, which are essential to crime prevention. In other words, they are going to leverage legitimacy into public safety.

We have enormous amounts of data. Victoria has been in the field working with the court and living with the citizens of Red Hook for many months, and we are analyzing our data now. But one of the things that we're trying to do is to create a theoretical framework. We had a framework going into the study, and we're refining it and developing it now as we begin to look at the data.

So our talk is really more about theorizing about community justice and what works, and theorizing justice is something that I

think is probably important to do. Why? Because if it's going to work here, we want to understand and explain why it's going to work somewhere else—that's the simplest question—and, second, we want to be able to give a good causal narrative, a good account.

In this theoretical perspective, the courts are part of a larger social network comprising the court and civil society, the community residents, all of which are working towards some kind of common good in the community.

The final goal of this partnership is that the court becomes an effective social institution that is grounded in that community, as opposed to being grounded in the centralized system downtown, and that it is going to engender more efficient mechanisms for addressing crime problems as they occur on the ground, both through formal mechanisms of justice and punishment and informal mechanisms of treatment, and also by again getting the citizens involved.

Conceptually, our justice center tries to do this in four specific ways. One, they deal with the social sources of crime. They try to have substantive impacts on criminal behavior through treatment and other remedial services, effective punishments, quick responses to wrongdoing, et cetera, et cetera.

Second, the court can build as a social agency, as well as a legal institution. It can build legitimacy because of the accretion of positive experiences of individuals who go through the court and who use the building. This court again signals the existence of a responsive process, a procedurally fair process. It has elements of therapeutic jurisprudence built in, community service.

All of this is communicated to the community at large through both the direct experience of the citizens in the court and also by some vicarious knowledge that they get because their neighbors are having contact with the court and going through the court and maybe even using the court. So we think, ultimately, there really is a process of contagion of thought and ideas and norms.

We think the court, again by its very presence, sends a signal that certain behaviors will not be tolerated. The law and the legal institution are part of the community, and those behaviors are rejected by the community. So again, there is this declarative effect of the presence of the court in the community.

Finally, what we think may be the most important result, is the creation of partnerships within the community, again either through these formal mechanisms of community groups, advisory boards, or informal mechanisms because of the individual relationships are built, all of them integrated within the local geography of

the neighborhood. In other words, accountability via concrete forms of integration of citizens into the functioning of the law; a form of privatization of the law, which is something that there is pretty good empirical data tending to show that such privatization helps to build social control.

All of these mechanisms are pathways to legitimacy, and we think that legitimacy is ultimately what is going to leverage the court into social control, moving the court from being simply a legal institution into one that also helps to facilitate social control.

In the interest of time, let me talk about what we have seen so far as very concrete challenges to legitimacy, the kinds of problems that I think are illustrative of what community institutions like the justice center are going to face over time.

First, what bugs residents about crime in their neighborhoods are not the kinds of low-level misdemeanors and petty drug crimes that are coming through the court. What bugs them are robberies, gunshots, drug-selling, and high-level obnoxious drug selling.

The court is doing a nice job at bringing people in and dealing with the low-level misdemeanor issues, but it is not getting at the public safety issues, and people ultimately will look for a payoff down the road.

Second, it is not clear that people want therapeutic jurisprudence. What citizens and communities often complain about is being treated poorly by the courts, being treated unfairly. Sometimes we hear expressions in interviews with residents in the neighborhoods that what they want is more efficient case processing and fairer judgments, not necessarily to be treated or simply to have their problems diagnosed. They basically want the court to do justice, perhaps not necessarily treatment.

This is a very delicate balance that the court is treading on because, on the one hand, they do want to do good, and they have a hard job, and they are accomplishing a lot with their treatment interventions, but it is not necessarily what everybody wants.

And so, if there is a change in due process—in other words, the rights issue, which is sort of looming in the background of this whole symposium—it could very easily delegitimate the court in a way that the benefit to the common good is lost, because the loss of traditional roles means that the players cannot fulfill some of the expectations that the citizens actually have of the court, again a very delicate balance.

Third, the courts are just one player in the criminal justice system, and in places like Red Hook, the police are the biggest player.

Some people in New York have lots of negative experiences with the police, others have positive experiences with the police, and the community still sees crime-solving as the responsibility of the police more so than the responsibility of the court.

It is not enough really for the court to say, "Well, the police are some externality, and we really can't deal with them; they are accountable down at Center Street, One Police Plaza, and so on." That will not work. There is going to have to be some concrete integration of the police into this creation of a new legal process within the community. It is part of that mechanism of accountability and privatization of social control that we talk about.

Fourth, Red Hook residents are constantly talking about their disillusionment with government and with the parts of governments that probably would make a very immediate and material difference in their lives—police and housing. Red Hook is eighty percent public housing, so there is some pressure on them to bring housing in. Now, the court is opening a housing part, but that would raise another very simple concrete example of a conflict.

The court is going to have a lot of drug defendants, and does have a lot of drug defendants, but when the housing part opens, there probably are going to be a lot of those same drug defendants who may well be evicted from public housing because of some of the laws and policies that are in effect both nationally and also in New York City. There is a very complicated, delicate balance for the court to tread. This will impose a legitimacy cost.

The major challenge that faces a community justice center and the efforts like it are to enlist the community in the creation of an undercurrent of a dynamic of legitimacy about the law, legal institutions, and in part about government programs in the community. Through this legitimacy citizens become engaged in crime control and become engaged in social regulation.

Everybody in Criminal Law 102—not Criminal Law 101, but in Criminal Law 102—knows that you get a public safety payoff when there is interaction of formal and informal mechanisms of social control. That means the police and the citizens integrated together.

I think that is in large part what the Red Hook court and the Justice Center are trying to do, and there are two really bottom-line theoretical perspectives. The normative one is this: They are trying to leverage legitimacy into social control, and that is a good thing, and we are very happy to be able to be close to the ground and study how this process works and what challenges it faces.

But there is an economic theory and it is a simple one: Does the tradeoff pay off? Does the abrogation of rights pay off in terms of either better treatment within the court or better public safety and a better quality of life in the community outside the court? Because when you move into the community, you become just another government program, and hopefully, this one will work very well.

Barbara Babb

University of Baltimore Law School

I am going to be talking about a court that is a little bit different than the kinds of courts you have heard about over the last day and most of this morning. I am going to be talking about a unified family court as a type of problem-solving court, and I have developed a theoretical framework for unified family courts that applies notions of therapeutic jurisprudence and the ecology of human development.

You heard yesterday about therapeutic jurisprudence. The ecology of human development is a social science systems theory that was developed by Professor Urie Bronfrenbrenner from Cornell University. Most of you may not have heard of him, but you probably have heard of Head Start. His research was responsible for initiating Head Start.

The unified family court that I propose is really a way to resolve the overwhelming volume and scope of family law matters in this country. I would like to give you just a little overview of my presentation. I am going to define a unified family court for you; give you a brief sense of the background and history of unified family courts, since they are different from drug treatment courts; talk a little bit about my framework; and then describe an example of a problem-solving court with this framework, which is the Maryland Family Division.

I want to read for you before I go further, if I can find things here, the mission statement that has been adopted by the court system in Maryland to define the work of our family divisions:

The mission of Maryland's family divisions is to provide a fair and efficient forum to resolve family legal matters in a problem-solving manner, with the goal of improving the lives of families and children who appear before the Court. To that end, the Court shall make appropriate services available for families who need them. The Court also shall provide an environment that supports judges, court staff, and attorneys so that they can respond effectively to the many legal and non-legal issues of families in the justice system.

I think that mission statement really incorporates a lot of what we've been talking about for the last day, and that mission statement is supported by thirteen core values of the family justice system in Maryland. I will talk a little bit more about this later.

Let me begin by talking about what is a unified family court. It really is a court with no agreed meaning, but I have been able to extract a few identifiers.

It is single court system with comprehensive subject matter jurisdiction. In order for this court to provide holistic treatment to families and children, the subject matter jurisdiction of the court has to be as comprehensive as possible, and by that we mean including everything related to family law matters: domestic violence, juvenile delinquency, child abuse and neglect, divorce, custody, child support, the full range of family law proceedings, including some inter-family offenses.

We are interested in having specially trained and interested judges. It's a court that addresses the legal, social, and emotional issues by affording families holistic treatment.

It's a court where informal court processes, social services, and resources are brought to bear for the families, either provided by the court or connected from the community to the court. We don't expect that the court can do everything for families, but it can make the connections back to the communities for the resources the families need.

It's a court that provides a comprehensive resolution to the families' legal matters instead of chipping away one issue at a time.

It is tailored to the individual family's legal, personal, emotional, and social needs. It must be tailored to the unique needs of that particular family. And it's a family that appears before one judge for one case or one judge for one family. In other words, we believe in continuity, that it is important for the family to not have to tell their story so many times, so that one judge who hears the beginning of the case should have to stay through that case until the end, and in some jurisdictions, every time the family comes back to court, they go before the same judge. It is a court that dispenses efficiency and compassion.

To give you just a brief history of the unified family courts, they are originally an outgrowth of the juvenile court movement. In 1899 the first juvenile court appeared. The first family court appeared in Cincinnati, Ohio, in 1914 and then a few selected cities. So while family court has been around since 1914, it really did not grow in popularity until the early 1960s. Rhode Island established the first family court in 1961; Hawaii followed in 1965; and New York, as many of you know, has a family court that was established in 1962.

Today, based on my most recent research, fourteen states have statewide family courts, which means that their entire state has a family court somewhere in the state where it is statewide. Twenty states have family courts in selected areas of the state. Maryland would fall into this category. It is generally situated in the areas of highest population.

Four states are planning family courts or are in the pilot stage, and thirteen states have no particular system for adjudicating family law matters; family court matters are mixed in with the rest of the civil docket.

Why is there a renewed interest in the family court concept today? Well, as you have heard, there are many problems with the existing court system. It is time-consuming, expensive, cumbersome, and duplicative. The same family can have to tell their story in many different courts or divisions of courts over and over, which is a waste of time and resources.

Child-related issues do not receive proper attention. Custody cases are often left to linger much longer than they should, rather than being given immediate attention. There is inadequate resort to alternative dispute resolution.

There is inadequate coordination of litigation involving the same family. As I said, the same family could find itself in several different courts depending on their legal issues, all of which are family law-related, or in different divisions of the same court.

There is a lack of interest, temperament, or understanding by some judges hearing family law cases, and this is particularly important in family law. If you do not want to be a family law judge, you should not be sitting in family court. These are cases which require that the litigants get the judge's attention and compassion and dedication to their issues.

And finally—and this is true, of course, across the nation—there is a lack of attention to the needs of poor and unrepresented litigants.

To give you a context for considering these problems, family law cases are increasing in volume nationwide. They comprise thirty-five percent of the total civil filings nationwide, and they are increasing at a rate of 1.5 percent annually. They are the fastest growing portion of the civil trial docket.

In Maryland, family law cases, excluding juvenile delinquency and child abuse and neglect, constitute over fifty percent of our civil filings. If we added in juvenile delinquency and child abuse and neglect, that number would be much higher.

When you add to the extensive volume of these cases their complex scope, the fact that these cases involve some of the most intimate aspects of people's lives, and that they are often complicated by other issues such as substance abuse and domestic violence, it is an almost overwhelming task for the justice system to try to resolve these families' problems.

With regard to my interdisciplinary framework—I will talk about this briefly—I have created a blueprint to establish unified family courts. Not all of the family courts that I've talked about have this same type of family court setup, and part of the work that the center does that is relatively new. We are a resource to state justice systems; we provide research, technical assistance, and advocacy for states that are experimenting with their family justice systems and attempting to develop unified family courts or are trying to reform the way they currently handle family law matters. We do that through the application of therapeutic jurisprudence and the ecology of human development.

This is the blueprint that I've created to establish a family court. To go through this quickly, the court structure is specialized and separate. That doesn't mean that it has to be—it can be a division of an existing court, so that suffices. That is the way Maryland has structured its court system. It's a separate division of our trial court of general jurisdiction with specialized judges.

Now, I would advocate, as would most people who work in this field, that family law belongs at the same level as all other trial matters, so that the family court, whatever it is called, should be at the trial court of general jurisdiction.

I've already mentioned comprehensive subject matter jurisdiction. This affords the families holistic treatment.

Specialized case management. We believe in very early and hands-on case processing. It's an opportunity to link the families with the needed services very early on in the court process. It's an ongoing process. I've already mentioned the one judge-one case, one judge-one family approach.

Another approach is to have a consistent team of court personnel, including case managers, so that every time the family comes to court, they meet with members of the same team.

This creates a greater sense of the court with regard to its responsibility to families. It offers the court the opportunity to fashion more effective legal outcomes. But it does require a high degree of court administration and organization. So case-process-

ing and case-management systems are very critical in our attempt to deliver this kind of justice.

The services, as I mentioned, can be either court-supplied or court-connected. Family courts are a wonderful way for the court to reach out to the community. What we've done in Maryland is create the position of family services coordinator in every jurisdiction. Part of that person's job is to assess all of the services that exist in the jurisdiction and bring available services to the court's attention so that we can link the court with those services, and judges have those resources available to them.

You do need to determine the essential services for your client population. So what is helpful in Baltimore City may not be helpful on the Eastern Shore or in Western Maryland, and these services should be delivered at the earliest possible point.

Finally, it has got to be a user-friendly court that is accessible to all litigants and accommodates litigants in the most therapeutic way possible. Probably ninety percent of the family law litigants in Baltimore City are unrepresented, so we struggle daily with ways to deliver justice to that unrepresented population, which is a major challenge.

That's the blueprint. The interdisciplinary framework I developed, as I said, incorporates both therapeutic jurisprudence and the ecology of human development. You heard yesterday from one of the founders of therapeutic jurisprudence what it is. I can't begin to top that, but I will tell you that, taking his cue, this is a court that is grounded in therapeutic jurisprudence, as he recommended, and it works. I can tell you that it is working.

How does it contribute to court reform in family law? Well, what's very important and central to family law decision-making with regard to therapeutic jurisprudence is that what constitutes a therapeutic outcome derives from the individual's own viewpoint. It is very individualized. The court has to determine what that is, assess it, and honor it. This is so important where you are dealing with intimate problems of people's lives.

I would suggest that by adopting a therapeutic approach in family law decision-making, you can and should expect the following consequences, and these are wonderful consequences for problem-solving courts and ought to be outcomes that other problem-solving courts should expect.

You empower individuals by allowing them to learn self-determining behavior and thereby, particularly in the family law context, decreasing the number of returns to court for the same family.

They begin to learn to solve their own problems because the court itself is modeling problem-solving techniques for the litigants.

It is a wonderful way to empower judges, because it allows them to be creative and consider alternatives; yet it minimizes the abuse of their measures.

The central goal of all family law decision-making is to protect families and children from present and future harms. Therapeutic jurisprudence allows this to happen.

It decreases emotional turmoil and promotes family harmony or preservation. And we encourage a therapeutic role for all court personnel—the clerks, the facilitators, the case managers, even the sheriffs who stand at the metal detectors as you come in the door.

We had some visitors to our new Family Division in Baltimore City who recently commented about how wonderful it was to walk through the metal detectors where court personnel are actually happy and welcome you, and what a great thing for children who are having to come to the court system to be welcomed by men who are smiling and kind to them. We hope to encourage this environment and role for everyone.

And it provides individualized, efficient, and effective justice that is based on the needs of the parties.

I am not going to talk to you about the ecology of human development. But it is a systems theory, and it does allow judges and court personnel the ability, by application of this theory, to adopt a holistic approach to families and children.

I also believe, and this is just sort of the next piece that I am working on, that these two theories together can promote an ethic of care in the family justice system, and I think this ethic of care has to transcend everything that we do.

I want to talk about the Maryland courts that have been structured along these lines. We have an extensive list of services that we have developed in the Family Division in Baltimore City that are replicated in other divisions throughout our state. These are based on needs assessments, canvassing resources, building coalitions, and evaluating the initiatives.

We are evaluating our family divisions along the lines of trial court performance standards that have been developed by the Bureau of Justice Assistance. Courts really are evaluated differently. They are evaluated along five components: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence.

What we are now attempting to do, at least those of us who work with the unified family courts, is to develop performance measures and standards so that courts can assess their own performance along these five measures.

My colleague, Jeff Kuhn and I recently worked with the State of Maryland, and actually, Judy Moran was involved in this study in its early stages, developing performance standards and measures for Maryland's family divisions. We worked with a group of judges, lawyers, and court personnel for over a year to together agree on what the performance measures should be.

We articulated the standard. We talked about issues related to the standard, and practical recommendations. Then we developed measurement systems to assess the outcomes, so that the courts can actually assess their own behavior.

The General Assembly in Maryland is very interested in this because they have funded the family divisions, at the insistence of our chief judge, Chief Judge Robert Bell, who is very supportive, and I do advocate judicial leadership from the top. Otherwise, this kind of law-reform effort is not going to succeed. I know this because I worked for ten years trying to make it happen in Maryland without the leadership of the chief judge. Once we got a new chief judge who said, "This just makes so much sense," my world turned around.

I am going to stop, but I will tell you that it's a wonderful and very worthwhile investment of time and energy because courts are the place that either everyone comes to or the problems find their way to, and it is really our responsibility as a society to try to help the litigants who come before the family justice system.

Questions and Answers

QUESTION: I have what I think is really a comment based on Adele Harrell's presentation. Adele showed us how what she described as contingency contracting is very important in increasing the satisfaction of the individual in drug treatment court.

I want to relate that—and this is a therapeutic jurisprudence point—to a body of social science research that I think shows how those of us in drug treatment court and in all of the problem-solving courts can kind of use this research in what we do.

I am referring to some work done in the mental health law area by the MacArthur network on mental health and the law, work done by John Monahan of the University of Virginia and his colleagues.

What they probed was the impact of coercion in the context of civil commitment. Mental hospitalization, when is coercion appropriate, does it work, and is it legally okay. They were looking at the question of whether involuntary treatment works compared to voluntary treatment, which is a burning issue in mental health law.

One would think you would look at involuntary commitment and compare it to voluntary commitment. But in truth, you cannot do that without having a thorough understanding of what makes people feel coerced, because what the MacArthur folks found was that being in one or another of those categories didn't really matter. People who were voluntarily admitted felt coerced—many of them did—and many people who were involuntarily committed, felt they made a voluntary decision.

So they did a study on the causes of these feelings and correlated them to what makes people feel coerced. What they found was that if people are given a sense of voice and validation and treated with dignity and respect and in good faith, then they feel uncoerced, even in a situation where they're subjected to legal compulsion.

Now let me relate this to what Ms. Harrell's presentation stated about contingency contracting. It seems to me that the point at which the individual enters into the contingency contract—this is a behavioral contract. This is the contract that the individual, in effect, does at the point at which they're entering drug treatment court, negotiating, in a way, with the judge as to the conditions.

I think we should make much more of that process. I think it should be a bit of a negotiation, a give-and-take. It's an opportunity for that individual to have a sense of voice and validation, dignity, and respect. It's an opportunity for the individual to feel, in

other words, that the choice that he or she makes is a voluntary one. It's an opportunity for intrinsic motivation to kick in. It's an opportunity for motivation to be sparked.

So I would say that the judge and the lawyers should place a lot of emphasis on this point in the process and remind the individual from time to time during the process that that was the deal that he or she made.

This also relates to a body of largely theoretical psychological research that shows that people who feel uncoerced, who feel they have made voluntary choices, do much better, perform much better, than people who feel that they've been coerced, for whom there is often a bit of psychological reactants.

Anyway, this is simply a comment, not so much a question, but of course, if any of the panelists have any thoughts on this, I would love to hear about it.

MS. HARRELL: I am very curious myself for Jeff to reflect maybe on how this process of contingency contracting might play out in terms of legitimacy, because I think he put his finger on one of the central problems we have here.

MR. FAGAN: Well, it took me a long time to get very old, and so I was comfortable saying, "I have no idea." On the other hand, that never stopped me from speculating.

You know, I think there are two, there are three sides—the way I think about legitimacy, we think about three sides of it. One is sort of a bottom-line payoff. If it really does have a material improvement, then there is some kind of an economic payback.

There is a procedural part of it, an affective component: If it feels good, then people will see it as being a good process. It may turn out to be awful. There's a hypothetical I give students sometimes; suppose you were in a racial profiling context, and we just simply profiled the hell out of some population, but we all gave them pieces of candy afterwards and cards that said, "Well, I'm doing this because it's really in our own good." We violated the civil rights, but we make them feel good. So would people accept that or not?

But then the third is a distributive component, which is fairness. You know, is it done with fairness, is it done proportionally? Am I treated the same way that the guy next to me is treated? Are things proportional? Is the onerousness of the conditions that one's compliance or violation of the contract would evoke, is the response proportionate, and does that make sense to me in terms of what I did?

I think people have sort of an instinctual idea about what proportionality means and what the going rate should be for their violation.

So if you can pull it off that way, then I think you can, as a product of that dynamic, create a sense of legitimacy among people.

QUESTION: One of the things that Jeff raised in his initial look at what's going on in Red Hook is that it's not clear that the community wants therapeutic justice, and they may want fairness and efficiency more.

I am wondering the extent to which we are using problem-solving courts or developing methods of therapeutic jurisprudence as a substitute for providing the traditional mechanisms that we look at as fairness, like lawyers for the litigants, because we haven't solved that problem. So how much does that impact on the decision to take another route because the other route might help us to solve that problem?

MS. BABB: I don't think that problem-solving courts or a problem-solving approach grew out of a frustration about what to do with unrepresented litigants. I think judges, litigants, the community at large, essentially everyone was discouraged about how family law matters had been handled. I will speak about those because that is what I do and that is what I study. So I think it was really a need where nobody was satisfied, and nobody was really being helped.

What happened to me was backing into this notion of therapeutic jurisprudence and saying, "This is exactly the way I practice law, and wouldn't it be great if we could really sort of transform people's attitudes about how to resolve family legal problems?" They are legal problems. Why not apply a problem-solving approach? Why not look at it as the court's responsibility to help the people who are there.

The court will have some effect no matter what it does, so why not change the focus from being a sort of a blank slate to one where they actively look for a way to help the families and children that are before the court?

I don't think that the increasing number of pro se litigants contributed to this, but I think in many ways pro se litigants are better served by this kind of court system because even though they don't have lawyers, they have resources available to them. We have made great strides in making the court system accessible to pro se litigants by developing form pleadings so that they now have access to justice, of which they had none in the past, and some services.

So there are places along the process where they are actually being better served by this.

MS. HARRELL: What I have encountered in doing focus groups is that most people coming through, even if they have an appointed defense counsel, don't understand the rules, don't feel represented, don't feel like they have a voice, and don't understand what is going to happen to them.

So to the extent that this resolves some of those problems, they may feel better served by this process.

QUESTION: As most of you know, especially New Yorkers in the audience, Chief Judge Kaye is vigorously promoting a restructuring of the court system here in New York State, which heretofore has been very fractured by eleven different ways of getting into the justice system at the trial level.

I am wondering if any of the panelists could comment on what effect restructuring New York's court system to make one trial-level court with divisions for families, and criminal, and civil, would have on the problem-solving model. Would it enhance it? Would we do away with it?

MS. BABB: I am happy to respond to that. I practiced law in New York for three years. Passing the New York Bar and learning about all the different courts is a pain.

While New York has a family court, that court doesn't have jurisdiction over divorce. So it doesn't have comprehensive subject-matter jurisdiction. It has many wonderful features, but it doesn't have the ability to treat the family holistically.

I think it certainly would benefit the citizens of New York to try to consolidate some of those courts. I practiced law in someone's kitchen in Upstate New York. Court was actually held in her kitchen with the dishwasher running. I'm not sure—that was not my notion of justice.

QUESTION: One of the things that has struck me as I have studied problem-solving courts is the following tension—I won't quite say "contradiction"—that I thought you might shed some light on, which is there is a lot of—one of the buzzwords is "holistic approach," right? Someone comes in, there's a family problem, it's a juvenile problem, there's a custody problem, whatever it is, and you say, "Well, we want to treat the whole family together." All right.

But, alternatively, you could say, "Well, part of this family problem is a drug problem." So when you say a holistic approach, what one immediately thinks is, well, there ought to be a court with sort

of comprehensive jurisdiction to decide everything because, of course, all social problems are interconnected.

And yet the movement has generally been to establish specialized courts of relatively broad jurisdiction within a certain specialty.

My question is—it is more a puzzlement—as to how one decides in the first instance whether a constellation of problems that has a housing component, that has a drug-addiction component, that has a family component, gets diverted to one of these courts and whether there is any thinking about comprehensively what the appropriate units are, without then giving up on this sort of holism.

MS. BABB: I think that one reason to concentrate on unified family courts is given the extensive volume of cases that they occupy in the justice system, I mean, to me that's a natural, that's a start.

I think that the scope of those cases is extensive enough already—and I've seen some of the issues in terms of trying to get specialized judges and services delivered to those families—that I would be opposed to broadening that jurisdiction much more. I think it's very effective as a way to resolve families' legal problems.

I do have some concerns about some of the spin-off specialized courts that come out of a unified family court, and I think there we are starting down the same path to—you know, we have the potential to give conflicting orders, duplicative proceedings, so that I have some concerns about that. But I think that the family piece of it is a large enough chunk to be self-contained.

MS. HARRELL: I have real concerns about the drug court specialties and the narrowness of eligibility rules for some drug courts that begin to shut out and perhaps focus all the resources on the less needy cases, because they've got mental health problems or they're not citizens and cannot qualify for publicly funded treatment or have a history of violence.

These may be the very people that are most deserving of these resources, not least.

MR. REMPEL: In essence, some of the community courts, the Red Hook Community Justice Center, are really what you're describing in a sense in that they're a single court that is really attempting to address a multiplicity of problems in terms of housing, substance abuse, unemployment, and educational component.

Though of course, the community courts, what is limiting about them is that, at least in the New York City example, they just had to take your "low-level" misdemeanor cases, so that you don't cur-

rently have a comprehensive court for all levels of charges that address all levels of problems.

We already have a model in the community courts that one could look to if one wanted to expand in that direction, and it may be inevitable that the more holistic problem-solving court that you suggest will occur at some point. I think it's just in some sense an evolutionary process that you've anticipated.

MR. FAGAN: Well, in Red Hook there are separate parts, and there are separate judges sitting in the separate parts. But he's handling separate problems separately, right, in separate callings. So it's kind of an optimization strategy, right? And it's a gamble because I am not sure—if the accountability mechanism is back through this process, then the optimization strategy is great, and one hopes for the right payoffs.

It requires a very special kind of judge to be able to do that, I think, to have substantive knowledge about the law in very diverse areas, and sometimes very complicated problems.

I think, just before you came in, we raised this tension about a drug defendant walking in, a person on a drug charge, and is dealing with a drug charge on one docket, and on another docket they are going to evict the kid, the guy's mother from public housing, and I am not sure how you optimize that one. That is just one example of—you could see the same issues around—so, for example, in the Nicholson case, the Supreme Court case on removal of children from ACS, there are tensions, and I am not sure what the optimization is there, either.

Nicholson is a case in federal court in Brooklyn, a class action of battered women whose children were removed by the child welfare agency to protect the children and avoid their exposure to violence and danger. But still, there is this tension about how you resolve that kind of matter.

It is an evolution. I am not sure how it's going to evolve. It's a real challenge.

QUESTION: I just wanted to comment on the last set of thoughts about creating a comprehensive community model. Having studied the problem-solving court movement, there is a question that has come up throughout its sort of later stages of development over the last couple of years, and the question is, How does the problem-solving court movement go to scale?

The question is, Are we in the court system developing these experiments within certain areas where we feel a therapeutic jurisprudence approach or a different administrative approach is going

to yield different results, and we are creating these experiments like drug courts and community courts, and we are then going to take those experiments and apply the lessons to a larger court system like Adele has discussed in the research that she has done on creating a comprehensive model where, for instance, any offense that has a drug-related component would result in some sort of treatment disposition?

Or is that we are just creating, magnifying these specialized courts? You know, you hear the numbers that people described, that in the year 2000 there were 500 drug courts, and now there are close to 1000. Is it that we want to multiply these specialty areas, or do we want to bring them back to the larger court system?

I guess that starts as a comment and goes to a question to the panel. What do the panelists think about that going-to-scale question?

And in terms of the notion of a comprehensive court, a sort of different idea of going to scale is that we've concentrated a great deal of attention in the court system on unifying the court system and creating centralized models to avoid local corruption; and now we are looking at the idea that that is an alienating model in terms of delivering justice in an efficient way. And so we are looking at actually putting the courts back into communities and experimenting with that as a model to create a comprehensive structure. So again, there is another going-to-scale question that the community courts raise.

So I guess my question cuts across all of your presentations to ask, you know, how do you see that going-to-scale question operating in problem-solving courts?

MS. HARRELL: I can talk about breaking the cycle, and that's the program that you referred to, and it's an attempt to take—it's a demonstration project that is essentially testing the feasibility of taking a drug court kind of concept but separating it from a problem-solving court concept to simply saying that every justice agency would make appropriate treatment referrals for drug-involved offenders independently of case processing. So if they were sentenced to jail, they would get it there; if they were sentenced to prison, they would get it there; if they were put on probation, they would get it there if they wanted community release.

The way the program—it's now in its, what, fourth year of evaluation?—is playing out is that what the communities involved have chosen to do is to not use a drug court model, but they are very much incorporating treatment alternatives in lieu of incarceration.

So I think to that extent what they have done is take the concept of therapy but not link it as tightly to the processing of the case.

QUESTION: I was just going to say that within the idea of a community court, I think what we were trying to say is that a community court has to be more than just an efficient service provider, which is what a lot of the problem-solving courts that we've been discussing, like drug courts, are essentially on many levels aiming to be, that a community court has to somehow engage the community, which I don't think could happen from a central court system, and a community court—I mean, the idea of it is the community itself wants more than just services. I mean, it wants some type of role within the court system.

I don't think that that sort of model can be taken to scale. But being an efficient service provider is something that the system should be at this point.