

2002

## Alternative Approaches to Problem Solving

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### Recommended Citation

Susan Finlay, Richard Hopper, Derek Denckla, and John Goldkamp, *Alternative Approaches to Problem Solving*, 29 Fordham Urb. L.J. 1981 (2002).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss5/7>

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**ALTERNATIVE APPROACHES TO PROBLEM SOLVING**

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**Susan Finlay***Center for Problem Solving Courts*

Good morning, everybody. I am Susan Finlay from San Diego. I retired from the Superior Court bench a couple of years ago after twenty years in the trenches doing criminal, civil, and juvenile matters.

Looking back, the highlight of my career was helping to start an adult drug court in the Southern Jurisdiction where my courthouse was, and then moving on to the juvenile court at the presiding judge's request to oversee the juvenile drug court there.

Those two courts, which were different systems, were really important to me in my career. I believed that I was helping make my community a better place, which was why I wanted to be a lawyer in the first place.

I have been in this business for thirty-four years, not as long as some but I remember as a brand-new lawyer, after being in my office for several months, going in to my senior partner and saying, "I'm just sick of people's problems."

And he said, "Susan, what do you think a lawyer is supposed to do? People don't come to you unless they have some problems." And I said, "Oh, okay." And he said, "If you're not interested in problem solving, you had better look at a different profession."

Well, here I am, all those years later, working with the Center for Problem Solving Courts with Judge Tauber, looking at ways, creative and innovative ways, that courts, lawyers, and other people in the system have discovered to solve the problems that they are facing every day.

The Center for Problem Solving Courts is trying to take an overview of this proliferation of innovative, creative problem solving from coast to coast, and it is an amazing experience because new courts are springing up every time I take a look, and I find out about another one.

We are also interested in educating people in the criminal justice system in regard to the various models and approaches, including the case-management systems that are compatible with problem-solving-court philosophies.

That said, I used to believe that judicial education was the way to effect change, so I became dean of the California Judicial College while I was a judge, followed by Judge Peggy Hora, who came after me. I took a course offered by Judge Hora in alcohol and other drugs in 1994, and all of a sudden the light came on when I under-

stood addiction, and I realized that just telling a person, “Don’t do it again or I’m going to send you to jail,” was spitting in the wind. It didn’t make a difference.

I was shocked to think that I had spent so much of my career, well-meaning—and as a defense lawyer I got people in programs and I really tried—well-meaning but not really understanding what addiction is.

In the defense of those in my generation, I would like to add that the information wasn’t always there. It is through science and recent discoveries as to how the human brain works that we have learned more, but now there isn’t really an excuse anymore, and we should know.

After leaving the bench, I went to work with West Huddleston at the National Drug Court Institute doing trainings across United States for jurisdictions interested in setting up drug courts. Marilyn Roberts, from the Office of Drug Court Programs, who is seated behind him, helps bring order to chaos, along with organizations like National Drug Court Institute, the Center, and the ABA. They bring order by attempting to find out what are the best practices, what are the red flags, what is dangerous here, what hurts people, what helps people, what works, what doesn’t work, what are the technologies available to assist us in our efforts, and how we can do a better job.

So, with that, I would add my thanks to Fordham for being forward-looking, for bringing together an interdisciplinary group to look at this phenomenon called problem-solving courts, and trying to get a grasp of the picture of what is going on here: Where are we going from here?

My goal today is to just give you an overview of what we have seen regarding the various alternatives to problem solving in a justice system context—and I did not say criminal justice system because it also applies to civil—so in the justice system context, which of course is my background.

Problem-solving courts are all about collaborations and they are all about partnerships, and they are about disciplines working with each other.

We have problem-solving courts in about eight or nine other countries—Brazil, Australia, Canada we heard about; we mentioned Scotland earlier. Puerto Rico, where Professor Bruce Winick’s partner, David Wexler, is ensconced. There is an International Association of Drug Court Professionals that Judge Tauber is either president of or former president.

The interest all over the world in how the court system, the justice system, can meet the needs of the community is stunning. It is really exciting and innovating.

So these are the professionals represented by us. There are others out there with whom we work together as partners to collaborate in this effort. And, of course, communications is important, as Jim McMillan pointed out—how do all these different agencies talk to each other?

One example that came to mind, when I was working in the juvenile drug court, we had a computer hookup between the schools, the probation department, the police, and the court. If a kid on probation was tardy at 7:30 in the morning, his probation officer knew about it when she got to work at 8:30 or 8:45, and the Court knew about it if the Court had asked to be immediately informed. Bingo! That was something that could not occur years ago without the technology.

And why is it important? Kids who aren't in school are in trouble nine times out of ten, and we needed to know what was happening. If school was a condition of their probation, certainly we would want to know that they were going to school. Maybe they're sick and home alone. We found that out. A lot of times, with both parents working, the child would be ill. Nobody knew. The phone would ring from the school or it didn't. Nobody answered, but the probation officer or the liaison police officer could visit the home to see, "Are you okay? Is everything all right here?"

The topic today, as I indicated, is "Alternative Approaches to Problem Solving," and the goal, my goal, is just an overview. We have heard about different types of problem-solving courts already. We've heard about the adult drug court, of course. That's the first so that's probably why. We've heard about juvenile drug courts, and we think there may be a little bit over 100 now juvenile drug courts.

There is an adult drug court in every state of the United States including Guam and Puerto Rico. That is amazing. We have mental health courts in eight states now, the last time I counted. It may be more. New York is coming on-line in March. The other states—Indiana, Alaska, Washington, Florida, California—that's Washington State. This is an amazing development.

The newest one is a juvenile mental health court that just started in January—we think that may be the first in the country—out of Los Angeles to deal with mentally ill and disturbed juveniles who

heretofore have not had a place to be in the system to get the kind of help that they needed.

Unified family courts, that's a big movement. Family DV courts, that's family domestic violence hookups, where the family court that hears the divorce also becomes aware of the domestic violence, and when there's another domestic violence criminal case; the same judge gets both of them.

Back to the unified court theory, which was mentioned by Mark Thompson from Minnesota, a unified court means that there is one trial court instead of two different levels, like misdemeanors over here and felonies over here, and sometimes the same person committing a number of each. You have an opportunity to have one judge get familiar with that case, or at least one court level, one court home.

Homeless courts, speaking of home. We're seeing those grow in California up and down the coast. Maybe we get a lot of homeless because they don't freeze to death in the winter, I don't know. But the homeless courts take in the mentally ill, you bet. They take in the substance abusers, you bet. That's a high percent of who is out there on the streets. And then they hook them up with the services in the community that they need to get sober, to get medication, to get health care, dental care, a shower, food, whatever it is, and temporary housing to get them back on their feet.

I was in a homeless court a week ago Wednesday, and there were eighty-eight cases on calendar. Eighty-eight cases, for those of you who have been in court, can take a long time. The city attorney and a public defender met before the court. They went over all the proof that so-and-so had been to this program and done this community service and had a job, and blah-blah-blah.

The judge came out at two o'clock, called the calendar. Everything was done by 3 P.M.— eighty-eight cases. Of course, one guy, I still remember him—his name, well, I won't say his name—had two pages of the calendar all to himself. He had eighteen cases. We talk about the revolving door. My goodness! He had two pages of the calendar, and the judge congratulated him. All the cases were dismissed, the warrants had been recalled. Homeless people have a lot of warrants. They don't exactly have a post office or a mailbox where these notices to appear can arrive from the courts, so we could never find them to tell them we wanted to see them except by issuing a warrant arresting them.

So homeless courts, juvenile dependency drug courts, teen or youth courts—we heard about Red Hook's, and they are growing.

School attendance performance court. I heard about a court in New Mexico, a juvenile court, where if the kid's grades go below C, the kid goes into court. And because they say, "Why wait for them to use drugs?" The parents and the kid come. They want the assistance. Something is wrong. And they're running great statistics, and that is kind of a preventative court, because they are not dealing with drugs; they're just dealing with kids who may be on the edge.

Child support courts. This isn't your traditional come in and why haven't you paid child support, and if you don't we'll put you in jail, you have thirty days to get a job. These are problem-solving courts that assist people getting employment, that maybe they need to go to the career center, and maybe they need clean clothes for a job interview, maybe they need some vocational training, educational training. They are hooked up with what is necessary to get the job to pay the child support, and that's a problem-solving court.

DUI courts all over the place dealing with felonies and misdemeanor DUIs. Talk about public safety protection. These people are out on the front lines. Thirty years ago, we had a way of dealing with DUIs, and it was a court management choice. We calendared in everybody who got charged with a misdemeanor DUI on Friday morning. We called it DUIserama, and I want to tell you, DUIserama, the public defender, the prosecutor, and the judge knew all the recent cases in DUIs. They knew how to handle a DUI case. They knew what should go to trial and what might want to settle, and they used to handle 100 cases in the morning, just zap, zap, zap, off they go, with probably a lot better results because the participants were educated.

Reentry courts, another one. Prop thirty-six courts, that's the type of court where by legislation if you're on probation, you cannot be put in jail for a substance abuse offense kind of thing. Deborah Small mentioned those the other day.

Landlord-tenant courts or housing courts, and then the probationer treatment court. Speaking of that, we've heard a lot about coercion, and it occurred to me as I was sitting here yesterday, I've been putting people on probation all of my career, and as a lawyer arguing for probation, a lot of times that included treatment, and not once did everybody say, "Oh, coerced treatment." The people were told, "You can have probation on these conditions. Do you accept them, or do you want to deny probation and go to jail?" Some people said jail sounded better, others said, "I'll take proba-

tion.” But nobody then said, “Oh, my gosh, these people are being coerced into treatment.” It was part of their probation plan.

Well, there’s a lot of other ways to handle the situation, but what I wanted to leave you with is this thought: Change has always been with us. The justice system has changed. Probation was a change. If you’re worried about recidivism, hanging and execution did the job, but the hanging part was disbanded many years ago, and we don’t execute people at the same rate that it happened in prior centuries.

So change has always been with us. The juvenile court is a change that happened about 100 years ago. We’ve seen ADR and other changes in our lifetimes, and we will see more. So remember that change is inevitable. But growth, the ability to handle it, is optional.



**Richard Hopper***Hennepin County Community Court*

The title of our segment is "Alternative Approaches," and I suppose the reason that I was asked to speak on this topic is because Minneapolis looked at the Midtown Community Court and developed its own alternative.

In order to understand how we got there, I think it is important to give you the setting that this was introduced in. It was about three years ago, and as Mark has already indicated, the court system in Minneapolis and in the rest of Minnesota is unified and centralized. So, therefore, for the City of Minneapolis, we have eighty judicial officers that rotate through the system, handle everything from speeding to murder cases, and are centralized downtown.

Minneapolis, contrary to impressions from people who are not from there, is quite a diverse community. We have the largest Somali population in the country, the largest Southeast Asian Mung population in the country, the largest American Indian urban population in the country, as well as Latin Americans from Mexico and Central America.

Another difference from the New York type of situation and other places that have developed a community court is in Minneapolis that the downtown is thriving. The pockets of crime were not downtown but, rather, they were out in the residential areas where people lived and where there were small businesses.

This was pretty significant for our planning because then it excluded the big players. The Marshall Fields, the Saks Fifth Avenue people, they had a great place for their shoppers, and so they really were not interested in giving us a big chunk of money to plan a court. Rather, we had to deal with neighborhood groups and small businesses that had no resources whatsoever to provide to the cause.

The murder rate had gone down significantly from the days when the *New York Times* called Minneapolis "Murderapolis" because it had a higher murder rate than the City of New York. Although the crime rate had gone down for those kinds of crimes, the street crimes were up. And when the players went out to the neighborhoods expecting to get a pat on the back, instead they were met with a great deal of dissatisfaction.

The police responded to this by developing a program called Code Four. The police chief is a former commander from the New York Police Department, and he basically recycled the COMSTAT

program from New York. It is a zero tolerance program in which people are arrested for anything from jaywalking to the famous and infamous crime of walking-on-street-when-sidewalk-provided. But they began to arrest everyone for anything.

The legislature had to run for reelection that year, and so they went out and they were met with all of this dissatisfaction, so they wanted to do something. Well, what did they want to do? They wanted to turn back the clock and undo unification. Certain bills were put into the legislature to recreate the Minneapolis Municipal Court because, obviously, these judges don't care.

Well, the leadership of the bench went immediately to the legislature because they did not want another bloodbath that occurred in 1985 over unification in the judiciary and said, "Don't do anything. We'll do something." And that's where I came in.

The administration came to me one day and said, "We have a job that we think you would like." It became a full-time, all-consuming responsibility that it is. They brought me out to New York and said, "Look at Midtown. That's what we want you to create. However, there's a couple of catches. Number one, we want you to do this but the rest of the bench doesn't; and we can't you any money beyond a planning grant for capital improvements."

This is what we had to deal with to set up a Midtown-type community court in Minneapolis—no money and not a whole lot of support from colleagues.

We began the planning process, and it took about a year. We had two different planning groups. One was the players, mainly the funders that fund the court system, the politicians that wanted something done.

We found with that group, for those of you who are thinking of starting something like this, was not really interested in meeting. They just really wanted to be kept informed and know that we were doing something. We eventually stopped regular meetings with them and just simply kept them informed.

Then we also had a doers' group, the group that actually did the planning. That was made up of the players within the system. One of the problems we had was that each player sent their higher-ups. And while it's good to get someone with authority from a particular department, it's bad because they haven't been in a courtroom for twenty years, and they have no idea what is going on. What we found in dealing with these people was that all they really were concerned about was coming to the meeting and protecting their turf.

We went for an entire year trying to convince these department heads to send other people. Eventually, they did, but it took a long, long time. I would suggest to anyone that starts a program like this to get the people that are familiar with the operations in the courtroom.

Also with the public, you need a public representative, right? Well, as soon as we said we were going to do this, the public began fighting over who was going to be represented. It was just a complete mess, because every one of these ethnic groups does not get along, even if they live in the same neighborhoods; the neighborhoods do not get along; and it becomes a real problem.

What I would suggest, and what we eventually did, is we hand-picked someone who was involved in the neighborhoods but also was intelligent, with some common sense. The other problem you have with dealing with neighborhood groups is that the people who have absolutely nothing to do in their lives tend to run them, and the responsible people are too busy, and so you end up dealing with neighborhood groups with representatives that may not be very easy to work with.

What we eventually did over the course of this year was find someone who could represent the groups from the neighborhoods, give the citizen perspective, but did not try to have a complete representative model.

Well, we went on for about a year of planning, and it was painful to say the least, because we had all of these things going on within the system. Eventually, we got to the point of adopting the Nike slogan, "Let's just do it." That is another suggestion I would make, is that at some point you just have to do it. Even if you're not ready to do it, you have to get it up and running and make the changes as you go, because otherwise you will never get it done. You'll plan it to death. I think someone has mentioned that throughout this conference.

So what did we end up with? We ended up with a community calendar that deals with the Third Precinct, the police precinct of the City of Minneapolis. We picked the highest crime area. About 100,000 people live in that area.

One of the things that we could not do because we had no money and because there was stiff opposition, was locate the court within that community. Luckily, it was just a bus ride away, and so we kept our court downtown because we had no choice.

We also expanded our crimes. We not only dealt with misdemeanors and gross misdemeanors, which capture the prostitution

cases as well as small-time drug cases, but we also did low-level felonies. Why? Because the public wanted it. I am sure it's the same in your jurisdiction, but criminal damage to property or theft, the degree of that offense depends on the value that has been stolen.

Well, the public, whether it costs \$250 to clean the graffiti or \$1000, that's still a graffiti case to the public, and so they wanted us to handle all graffiti cases or all criminal damage to property cases. And so that's what they did. We combined both gross misdemeanors and felonies on this calendar.

Another thing we did was take from the housing court criminal nuisance cases. Now, these are not your typical nuisance properties involving a coat of paint or failure to mow your lawn or things like that. These are offenses that the prosecutor's office is empowered to bring against a particular piece of property because it's being used for criminal activity. All they have to do is prove that it has been used at least twice in the last twelve months, and the court has the authority to board it up for a year. It's a significant hammer.

The prosecutor's office began bringing these actions against crack houses, saunas, convenience stores that are used for fencing operations, and it allowed us to bring these people in. The community loves these cases because they all know where the crack house is, they all hate it, they're sick of hitting the floor when shots are fired and things like that in the community. We had the ability to bring people in and say, "You either clean it up or we'll shut it down."

Like people have been talking about, a lot of the same people that I have kicked out of their grandmother's house for dealing drugs are the ones I see in community court on other offenses. So there is a lot of spillover from these cases. But we handled those as well, and like I said, the community just loves it because it goes right to the heart of the livability of a particular neighborhood.

We took the social service component and put it out in the neighborhood. We have a social service one-stop-shopping place that delivers at least six different social services. Our community court probation officers are there. It is a Midtown type of deal, right above a video store, in the heart of our catchment area.

Not only do we have all of the services there, but the people who work there are cross-trained in a number of them, so that an individual only has to deal with one person to get their housing needs, their employment needs, their CD treatment, and things like that.

We duplicated the community service component of Midtown through a program called Sentenced to Service which already existed but which was not running to its expectations, and we were able to go to these people and have them dedicate a work crew to our community, and so we have people that can go directly from our courtroom out to the community where they offended.

We started this court about two years ago. One of the things I really wanted to do was not only just create something but also use it to create an impact on the rest of the system. That's the stage we are in right now.

First of all, we created a community impact calendar, which deals with the entire city now. We have work crews that leave the courtroom. So we are able to have people go right directly from the bench onto the crew and have a lot of the other facilities right there, and we deal now with the entire city.

We have a property calendar that deals with all felony property offenses from every part of the city. It is modeled really after drug court and community court. Its emphasis again is on services, and it is on giving service to the community and restitution to the specific victim.

And finally, we are tackling, like everyone else is, the mental health issues. While we are not going to have a mental health court, our chief judge calls it a virtual mental health court. We are going to try to incorporate the mental health court principles into our everyday working calendars, because all of these calendars are just interlaced with mentally ill people that we have to deal with on a regular basis.

In conclusion, I wanted to give you a few tips from someone in Minneapolis that went through this and created something out of a whole lot of nothing, I guess, to a certain extent, and that is this: First of all, someone said yesterday that someone in the planning process has to have the passion to get this done, and that is so true.

If you look at any particular system around the country, there is one player, whether it's the DA or the court or someone else, that says, "I really want this, and I'm going to push it," and then pull all the other players along, because otherwise, if you don't have that, it will never get done, because there is so much politics involved in the criminal justice system, somebody has to not take no for an answer.

Secondly, don't plan it too much. At some point you just have to do it and then build in increments.

We took a lot of time worrying about how many cases are we going to have; it's going to be awful. And finally, we just had to say, "We're going to do it. We'll start small," and we built, and it worked out great that way.

It also allows you to get things done and slide it through without a lot of flak from all the other players, because all of a sudden we're doing it, and it's not bad. If you start giving them prior notice, they all are so afraid of everything, they'll oppose it till their dying day.

Get the right mix of practice and authority in the players. The people who plan this have to know what goes on in a courtroom on a day-to-day basis and have some authority to make decisions and represent their office. But they have to have that mix. Otherwise, you'll never get anything done.

Also admit your failures. One of the things that we do is we admit that this didn't work out too well. We just did a chronic-offender program through community court and it was a dismal failure, and I will be the first to admit it. But we learned something from it. But rather than start with this agenda like, "This court is just going to be great; just wait," if you start with that attitude and expect it, you're headed for failure and people aren't going to believe you.

What I have found is if you say, "We made a mistake," people accept that. And you have to be free to make a mistake in order to experiment, and that's what this kind of court is.

And then the last thing is, I don't think a community court or a drug court is worthwhile unless you do plan on taking all the lessons learned and transferring them to the system as a whole. I think you have to have your laboratory, you have to see what works and what doesn't work. But unless you're going to change the overall system, you are never going to have an impact on the problems that at this point are plaguing the criminal justice system.

**Derek Denckla***Center for Court Innovation*

Just to give you a quick background, I worked for a few years at the Center for Court Innovation, working on establishing sort of a theoretical understanding of the lessons from problem-solving courts, as well as being involved in the initial planning stages of several different programs, including the Brooklyn Mental Health Corps, which is scheduled to open soon.

Before that, I was involved in community development law, which has some related lessons to the topic here. The topic is alternative approaches, and one thing that I would like to do is break down some of the discussion of various theoretical categories that have arisen in the discussion about what it means to do your job differently as a lawyer.

The first thing that I would like to do is relate my discussion to lawyering in general as it impacts problem-solving courts, lawyering being that of the defender, prosecutor, and the judge, seeing as all those parties are usually trained in the law.

Problem-solving courts, interestingly, their title arises from sort of a two-pronged understanding of what the problem is. The first problem is the problem with the court system itself. As we have heard from the community court, that story over and over again, and the drug court story, those courts are not really doing their job.

So the problem is not really exterior to the court system; it is the problem that the court system itself is trying to solve about what it does.

Then the second part is that what we normally think about problem-solving is that it is solving a problem that the court sees in the litigants that are before it; in other words, a drug problem or needing to be more responsive to the community.

But in fact it is a dual approach, and I would like to focus on the problem that arises within the lawyering that people do that causes them to see the need for a different approach.

Problem-solving courts in general arise from the system players' frustration over their inability to have an impact on persistent problems that they see in their litigants. So they themselves, have a problem with the fact that their job is not playing out the way that they would like it to. They have a frustration over seeing the same types of cases, not having an effective impact, being inefficient in dealing with caseloads, hearing from a frustrated public, et cetera.

Now, what I think is missing from our discussion in part is an understanding that part of why people arrive at that place of frustration, either if you are the prosecutor, the defender, the judge, or a court administrator, for that matter, is that it has to do with the nature of the legal system in general and in particular the way that we're educated in law schools. And so, since we are here in a law school, I am going to take a minute to be the person who talks a little bit about different approaches to legal education and how we can use innovative practices in the fields to play back on legal education.

When we all went through law school, those of us who are attorneys, we were trained in this system of taking a set of facts about the world, a hypothetical, and in the Socratic method we are all asked to respond to the professor who tells this story about the world, and the professor says, "What should the outcome of this particular be?"

Then all of us are made to feel very foolish when we come up with common-sense answers to the problems, because what we are really supposed to find is a legal solution, which is a very narrowly defined set of answers that the state allows us to provide based on a legislative or regulatory process.

So every response that a lawyer has in general is dictated by that sort of humiliation that you should leave your common sense at the door and then respond with a very narrow set of legal presumptions that are allowable within the context of the law. And that is where we learn about the world in terms of the case. And that thinking about the world in terms of the case, that sort of innovative shaming process, if you will, causes us to go out and practice in exactly the same way.

But how does that play out in the field? Well, that plays out in the field where, when we are practicing the case, we noticed that the people before us, not really leaving our common sense too far behind, are actually thinking, feeling creatures who don't just have legal issues. The reason why they are before us in terms of us being defenders representing them or prosecutors who are bringing a case against them or judges who are hearing the case, the reason why they are there is because they have fit in within that little narrow set of definitions that the law provides which allows for a state intervention of various kinds.

But what actually brings that person before us is very much more complicated, and we all realize that, although we have to turn a blind eye to that and just pursue the case. I think it is a frustration



over that conceptual severance between our common sense and our legal training that causes people to begin to think a little bit differently.

Another problem within the training is that we are trained as generalists. Supposedly, everyone who receives a law degree, except for patent lawyers, who have the luxury of actually just doing one thing, lawyers are all supposed to be able to do everything. In other words, you are supposed to be able to do a criminal matter, a civil matter, a family matter, a regulatory matter, lobbying, whatever the client requires.

Well, that is a complete fiction, and in fact there is a heavy—you know, if you look at the ABA, it is broken down into hundreds of sections, never specializations like in medicine, where you actually take a set of boards that allow you to become qualified to practice in a particular area, like if you ever went to your brain surgeon and he was telling you, “Well, I’m trained as a generalist; I hope that’s okay,” you would probably be a little nervous about the quality of his incision; whereas, in the law, we are all trained as generalists. So there is another fiction that is dealt to the people who leave law school, that they are generalists.

In part that helps us see that there are other legal dimensions to the people before us, as we’ve heard about, like if someone comes to us in a criminal matter and we recognize that there may be a divorce matter that impacts upon that, a child custody matter, so that part is actually salient to creating a greater understanding that there is something that we can do, but we also understand the limitation on our actual capacity.

The practice actually has the reverse effect of the earlier thing that I was saying, that it’s a humbling process whereby you realize that there are the other legal dimensions but you are actually empowered to do anything. So there is a tension between these two things that causes people to come up with different approaches.

A whole set of approaches could fall under the rubric of problem-solving lawyering, and I will just throw some of them out because they have some interesting historical significance for the kind of work that is being done in problem-solving courts.

We heard yesterday that the Legal Aid Society was a pioneer of what is called interdisciplinary practice, which problem-solving courts have adapted to a more institutional model, but it is just the “Aha” of, Hey, if we had a social worker on staff, we could actually solve a whole bunch of these problems that we keep referring inefficiently to other agencies and never really know what goes on with

them, and we could actually deal with those issues in house; or that we could do a blended representation model, like integrated represented, where Legal Aid Society, which has both a huge criminal division and a huge civil division, said, "Hey, wait a second. This person has multidimensional legal problems. They have a housing case and they have a criminal case. Wouldn't it be interesting if we actually provided some form of civil representation for them?"

And then that model is expanded even more by the Vera Institute of Justice in what is called the neighborhood defender model. There is one up in Harlem which explores the idea that people who come to the defender service are of a certain character within a certain area. In other words, they are going to have a certain set of demographic characteristics which are going to cause them to have a whole host of problems that lead them to the criminal justice system; in other words that sense that we all had in law school that a person's legal issue is a very narrow set of problems the person has, and if we just solve that person's case, it is not really going to solve that crisis that they are in at that moment.

Thus, there are all of these modalities we are exploring like an expanding case model, and what I would like to submit to you is that there all of these different approaches, and clearly the problem-solving court's model tries to author a different notion of lawyering where the notion of the case should be expanded.

But it's a spectrum which makes lawyers very nervous because it goes somewhere between the case and the person's entire life, that is where problem-solving should fall. And, obviously, the people who are autonomy-seeking, freedom-loving Americans, they don't like the idea that either the state or even your friendly neighborhood lawyer is involved with your entire life.

Obviously, there is some problem, there is some conceptual severance between our understanding of the case and our understanding of the whole person's life, and there is something on that spectrum between the case and the person's entire life where we feel like the capacity of either the lawyer as a representative or the lawyer as a judge or the lawyer as a prosecutor that we are failing to actually connect appropriately with a solution for that person based on what they have just presented in the narrow form of the case.

This comes up in theoretic disciplines that have been discussed here, such as therapeutic jurisprudence, where it is searching to find the therapeutic effects of the law and attempting to craft solutions that are more responsive to those effects.

Then there is a whole school of preventive law, which Louis Brown came up with, and it hasn't really gotten a lot of traction, but it is very interestingly related to therapeutic jurisprudence, a sort of family doctor model of the law. You don't actually wait for somebody to have a calamity. In other words, you don't wait for them to have a slip and fall before you sort of get their whole life together for them. You say, "Look, you might want to anticipate the fact that you're not doing your taxes properly, and you might want to anticipate the fact that your housing situation is something you cannot afford.

The lawyer would be like the way that a counselor for a corporation would anticipate the needs of the corporation. You would have a family law system—this is, by the way, a pie-in-the-sky sort of theoretical model that was offered, and obviously costs are a huge issue—but another approach to how lawyers could deal with the complexity of the legal issues that people actually end up having crises about as we've heard before, that people are more and more turning to the justice system to solve serious issues they have based on the complexity of their interface with the regulatory and legal state, that this model of preventive law offered a solution for people to try to get on top of the legal issues before they are actually in court.

Then related to that is the notion of popular education, which is another thing that was very big in the sixties, about know your rights and allowing people to develop a set of understandings about what their interface with the legal system would be and how they could handle it themselves and a self-help approach where lawyers would guide that effort, lawyers as teachers, which is a role that many lawyers don't really feel comfortable with on that continuum between the case and the life of the client.

We have heard other things about holistic lawyering, rebellious lawyering. These are other terms that are used—community development lawyering—where lawyers are attempting to expand their role beyond a notion that the person is presenting you with a narrow set of legal situations, holistic lawyering being the idea that they are going to deal with the whole set of legal issues or the whole person. There is actually a set of scholarly writings on the idea that you should actually deal with the whole person, as upsetting as that may be to the notion of intervention.

And then the rebellious lawyering and the community development lawyering, which are closely linked and something that I have written about, is another approach where it says that you shouldn't

actually think about the individual; that's a mistake. It should not just be the individual and the individual's case. We're going now beyond the entire life as a measure of your lawyering capacity but to the community, which is something that problem-solving courts attempt to do, so it is not so far-fetched.

The reason why I am mentioning all of these alternative approaches is to say that a lot of people are grappling with the idea that something is very unsettling about what we do in terms of how it matches with our commonsense ideals about how we should treat people and our training as attorneys in terms of what we are supposed to do in terms of the narrow set of ethical and legal obligations that we have for people.

I would propose that the idea be explored more through everyone here going back into their communities and thinking more broadly about how to take this conceptual problem into a legal educational model.

There actually are some universities that are grappling with this. In particular, California Western University has an entire program that is dedicated to problem solving as an approach to lawyering, which is largely modeled on the business education model, which I think in a funny way is kind of way ahead of law in terms of doing the case study analysis of a set of problems and coming up with a whole range of solutions, rather than just a narrow set of legal ones, because in business that actually makes good sense.

In looking at that, kind of new ways of doing the legal education, not just in the clinical context, where again it is just related to the case, but a broadened approach to the representation and the job that lawyers do.

There was some exploration of this, by the way, during the Clinton administration. There was an entire proceedings that I recommend you all talk to Marilyn Roberts about. I think Mary Breen chaired a panel in 1998 of a discussion of how to expand problem solving into legal education. It is the first discussion in a long series of discussions that have come from that about how to take this urge to deal with more than just the case and make it into a more disciplinary practice that we could all actually bring to bear as a teaching tool.

So that is the overarching overview of these alternative approaches to lawyering in a problem-solving context.

**John S. Goldkamp***Temple University*

I would like to talk more generally and more conceptually about thinking about problem-solving courts and how we consider their ultimate contribution.

In 1913 Roscoe Pound wrote the following: “Whenever any new type of cause arises, the primitive device is to set up a new court, and that in a time in which unification is sorely needed, the tendency to make new courts is still strong with us.”

I try to keep these thoughts in mind as, in my work, I think about and look at the development of problem-solving courts in a variety of settings.

Over the last ten years, you are familiar with all the discussion about whether this movement, broadly conceived, is appropriate, beginning with drug courts and moving on through all the other courts—through community courts, domestic violence courts, mental health courts, reentry courts, so forth and so on—whether it was a momentary fad or a blip or whether, when the Republicans come in, we will still be doing this; or whether this really represents a significant change, a potentially fundamental change, in the way we think doing justice and thinking about justice in the courts.

Some argue that the history is still too short since, according to my view of the history of problem-solving courts, it started in 1989 in the first drug court in the United States in Miami, so it not a very long time—too short to fully gauge the impact, although in my experience as a researcher, and now looking at the growing research and an accumulation of research results, I think we’re beginning to accumulate a body of evidence that suggests this does have serious impact.

Well, the question no longer is, Should we have problem-solving courts? I think that question was answered more than a decade ago when we started having them. We have them. They are here in all their forms, and they are growing in number, and even the Conference of Chief Justices passed a resolution supporting them.

That wasn’t always so. Marilyn Roberts and I were at a Conference of Chief Justices about ten years ago where they debated whether this was at all appropriate to be getting involved in as a court system.

The question is more, I think, ultimately, what will they represent? What effect will problem-solving courts have on the way we do justice in the courts? How will they fit in within the existing

system? What character will they take on as they grow in number and are dealt with more systematically, as opposed to being considered unorthodox projects supervised by well-intended judges in isolated jurisdictions?

I think the important question about problem-solving courts is not about alternatives to problem-solving courts but about whether the notion of problem-solving courts overall represents a serious alternative to the traditional way that we've been doing justice in the United States.

So the question is to me, to what extent do problem-solving courts represent a serious alternative to normal justice processes? And I think the answer to that question depends on what happens or how issues are resolved in six areas. Those areas are: the methodology of problem-solving courts, the substance of the problems addressed by problem-solving courts, the philosophy reflected in both the substance and methodology of problem-solving courts, the role of judicial discretion and coercive power in problem-solving courts, institutionalization, and demonstration of impact and effectiveness.

I am just going to briefly highlight what I mean about each of those.

**Methodology:** Well, in my view this all starts with the drug courts, and you might be thinking now that drug courts are so common-place, we have over 600 of them in rural, American Indian, Alaskan Native, and in urban jurisdictions, but they have played a critical role in all of this in opening the door and leading the way for problem-solving courts overall.

You know the methodology. It's the non-adversarial courtroom. It's the different way of conducting business, using the courtroom as a theater in the square, the linkage with resources, all of those kinds of things that you know about, the focus not so much on the case but on the problem. This method itself marks a potentially significant difference from the traditional justice process.

The substance of problem-solving courts. Problem-solving courts are also different because the substance of their work represents a major departure from traditional functions. It is an explicit attempt to deal with the root causes of crime. Drug courts opened the door. As soon as judges said for the first time, "Okay, we're going to go in and supervise treatment and lead it in the courtroom," it was a recognition that we're going to deal with the problems of the people who come to our courts, rather than just with their cases, and once that happened, the door was opened.

The committed judiciary responded, “Well, wait a minute. Maybe we can do that with domestic violence, mental health, and so on and so forth”

So while I think drug courts broke the mold, I think a particularly significant development was the development of community courts, because all of those other courts, the substance of their business focused on individual kinds of problems that make the person’s whole life miserable and make them come to the courtroom.

The community courts placed this in the context of community and tried to deal with the notion of community in a number of important ways: the community as victim, the community as restorative agent, the community as co-participant in treatment and in solutions.

And community courts, ambitious as they are, try to address the question of the public’s perception of justice, questions of access to justice, and to try to deal with the gap between the machinery of justice and the public’s experience of it as it played out in neighborhoods, as it played out in geography.

It is my view, after all the work we’ve done in studying drug courts, and so forth, that those other courts, at least implicitly, are community-oriented courts. Downtown drug courts, for example, don’t serve the whole town. They serve, in my view, a collection of seven or eight of the principal neighborhoods that have the greatest problems. So this dimension in the substance of problem-solving courts was really a fundamental addition.

Philosophy. The method and substance of problem-solving courts is reflected in a different philosophy, first something we never talk about. I think when you look at problem-solving courts that service is a mission. The people who are involved in problem-solving courts and all the extra work it takes to learn about the problems they don’t know about, to organize the resources in ways they haven’t been organized, aren’t doing it because they get paid more. That’s in the background. That’s part of the philosophy.

The other part of the philosophy, the major part, is we are dealing with the root causes of crime; in other words, trying to deal with the problems, not the cases, and thinking about crime the hard way, through root causes, and doing this, trying to implement a mix of justice goals, a combination of reparation, rehabilitation, and deterrence—rehabilitating the individual, addressing those problems, repairing the community, making reparation to the community, and there’s a fundamental role for deterrence in problem-solving courts.

The significance of deterrence cannot be understated because this is where the coercive power comes in. For those of you who are familiar with your deterrence theory, it has to do with the manipulation of sanctions, and that is a theme throughout problem-solving courts. What is different about this philosophy is not so much that these values aren't in criminal courts somewhere, sometime, but it's the package and it's the mix.

I think when we ultimately assess the contribution of problem-solving courts, one of the questions is going to be what happens to that mix when this gets institutionalized.

Judicial discretion and coercive power. Well, of course, it's the coercive exercise of judicial discretion that provides the authority for the deterrent impact for the coerced treatment in problem-solving courts. And this is interesting. Judges haven't had this much fun ever since their discretion was stripped from them through sentencing reform.

Over the history of criminal justice in the last century, there has been an association between broad exercise of judicial discretion and rehabilitation. So one way of looking at problem-solving courts is the judiciary has an opportunity to be a judge, to reestablish an exercise of judicial discretion, and all of this to focus on the substance of the problems that people have coming into the courtroom, within the boundaries of the more punitive philosophies which surround problem-solving courts and define their borders.

So judicial discretion provides the authority for the particular brand of coerced treatment that is practiced in problem-solving courts.

Institutionalization. Well, every reform comes with questions about its long-term survival and its integration and its institutionalization to existing systems.

In the early stages when, in this movement, some of the most compelling and far-reaching experiments raised questions about the status quo, the objective is to bring about fundamental change in a really serious way. The irony or the paradox is for an innovation to bring about that kind of change, in order to be successful, it has to become integrated, institutionalized, and survive, and this means it involves accommodation to the existing system.

There are real serious questions for problem-solving courts about their long-term survival and impact. How well they survive? Where will they survive? Under what conditions? Why? And, if and when they survive, what happens to the original ideas that started all this? What is it going to look like after a while? What



happens to the methods and the substance and the philosophy that so characterized the very interesting and innovative courts that we have seen?

Finally, demonstration of impact and of effectiveness. I think here problem-solving courts are like everything else. The viability of problem-solving courts has to be linked ultimately to a demonstration of their impact and their effectiveness for their survival. Well, that's a real challenge just to think about how you would measure impact.

I think the early results, and we have had a chance to look at this in major studies in Miami, Philadelphia, Portland, Las Vegas, in drug courts, domestic violence courts; we're looking at mental health courts and reentry courts, I think that the early evidence is powerful.

One of the most convincing forms of evidence is when we conducted focus groups of drug court participants around the country and to hear them talk about the difference these things have made in their lives. These are very, very seriously addicted folks with long records of prior criminal history. That surprised me. I thought there is a chance that a good part of the population that the drug courts were addressing were people who were not very seriously involved. That is not the case at all. It appears to make a real difference.

But all forms are unlikely to produce the same results in all places. Impact is going to vary from place to place, and from our research in Portland and Las Vegas, where we looked at the drug courts over the decade of the 1990s, within each jurisdiction over time the impact of problem-solving courts will be likely to vary.

Our interest has been in not saying, "Are they effective?" but now moving beyond that and saying instead, "When they are sometimes effective and sometimes less effective, what are the ingredients that make the difference? What in this package that we talk about really counts?" And so we have tried to begin to sort out the role and power of judicial discretion, treatment, sanctions, and those other things.

A final question that I will leave you with is, thinking about how we will ultimately assess the contribution of problem-solving courts may be now that we have learned the lessons of these courts, and if you ask the question of why do we have problem-solving courts, it is because the courts are the social-service institution of last resort due to the failure of all the other systems.

The problems are in the courts. The courts have tried to deal with them. Can we now say that the lessons we've learned in the courts have changed the outside system to a sufficient extent that it doesn't have to be the courts any longer who lead the repairs?

### Questions and Answers

QUESTION: Hi. As a law professor, I feel compelled to respond to Derek and just sort of enlighten you about some of what is happening in legal education. I don't know when you graduated, but things are a little bit different along several lines.

First of all, our clinics are not just doing individual client representation. I've taught in the Family Law Clinic at the University of Baltimore for many years, and my students testify before the General Assembly. They have assisted in some of the effort to reform the court system. So they really are engaged in law-reform projects as well as individual client representation.

Secondly, and I will speak from the University of Baltimore's perspective because I am most familiar with that, we have created areas of specialization of study so that within the academic curriculum one can choose one, two, three, or more areas of specialization. You cannot hold yourself out as a specialist, but it is indicated on your diploma that you have gone through a course of study in a certain subject-matter area that reaches a higher level of analysis and understanding of the law in that area than would otherwise be the case.

Generally, many law professors across the country are teaching in ways that incorporate notions of preventive lawyering, client-centered lawyering, client-centered counseling, therapeutic jurisprudence. There are entire courses that have developed around these, and many people, including myself, incorporate those notions into their teaching on a daily basis.

I would submit that it is not the same law school, it is not the same academy it has been in the past, and we are working very hard to change that.

That was just a comment more than a question.

MR. DENCKLA: I appreciate that. No, I am very aware of the state of legal education. I teach here at Fordham, and I know that there are a lot of people doing a lot of really good work.

All I was seeking to do in my comments was to elucidate some of the tensions for the people who are actually out there practicing now who did not have the benefits of some of the innovations that are taking place now in the law schools, and those are largely the people who are practicing, training other lawyers who come out of law school, and who are by and large going to be the judges.

I am very aware, and I know that the programs that you have been involved with are some of the most progressive. In fact there are a series of conferences that University of Baltimore has spon-

sored in terms of community-development law. I know that there are community-development law clinics throughout the United States. There was a gathering at the Department of Justice that I took part in two years ago where they brought together the people who were working in that capacity.

I know that there is a lot of really good work being done, and I don't mean to flag the capacity for legal education to take these things on. What I was suggesting was that it become more pervasive.

In the same way that problem-solving courts are sort of boutiques, in some ways the alternative approaches are extremely varied. I meant, the list that I had had ten items on it, and I could have added a couple more in terms of the things that you listed, and it is always good to add those disciplines so that people understand the variety of approaches.

In some ways what I was arguing for is a certain consolidation under the umbrella of problem-solving, which makes it more coherent to talk about the way to approach your law practice, which is what people actually do when they go to practice law a little bit more than what happens when they come out of law school. And I was just trying to elucidate some tensions that I saw.

In addition, what I was saying about specialization was more—it wasn't saying that law schools don't provide specialization in terms of education but that actually by statute, you are supposed to be a generalist. In other words, you are not supposed to hold yourself out as a specialist, and that creates the dual tension that I was suggesting between the notion that someone has an expanded set of legal problems, and to try to craft a solution like you were saying with the unified court, you see that as a game because you are conceptually thinking about things as a generalist.

But in fact, the way we practice as specialists, it creates anxiety in judges and in lawyers about doing more, and so that is why they are reluctant to change their practices in the field. Judges are reluctant to take on what they see as social work, which in fact may be family law added to criminal law, et cetera, et cetera.

That's the only reason why I mentioned those things.

QUESTION: John, does the judicial branch have any type of legal authority to respond to laws that are made by legislators that might hamper the way your decision-making occurs from the bench?

JUDGE FINLAY: No. Judges take an oath to uphold the law and defend the Constitution, and we certainly have to follow the law.

What we have seen is—somebody called it subversive earlier—but we have seen courts set up that are within the law; in other words, there is no law against them.

Now in some states we are seeing laws that specifically refer to drug courts as part of the criminal process. So it's the law following the formation of the court. Domestic violence is certainly dealt with in the law in most states in domestic violence courts and treatment referred to and required by statute.

But, other than declaring a law to be unconstitutional, if that is brought before the court as an issue, judges, in my opinion, have to follow the law. We cannot just say, "Well, we don't like that one," tempting at times as it might be.

MR. DENCKLA: I think in this forum that—one of the things the urban court people talk about when we get together with the administrators is how do you sustain these courts beyond the personality that has driven them to the point they're at, which is a real challenge for us in terms of large city court administrators. We have all these resources dedicated to this court, and then Rich Hopper leaves.

FEMALE PARTICIPANT: If I could respond to that, too, I've seen—I think the whole notion that it has to be a charismatic judge is wrong, based on how this has played out, because there are plenty of uncharismatic judges who are very competent and very nice people and very capable who are very good drug court judges around the country. So I think we have moved past the charismatic judge stage in the drug court evolution.

JUDGE FINLAY: I think what Richard was referring to, which I agree with, is the commitment, is the passion, not whether you speak well in front of the local Rotary club and can razzle-dazzle the press, but it's how much you care about bringing a necessary change-about that will help your community.

FEMALE PARTICIPANT: But I think judges learn that. They rise to the occasion.

JUDGE FINLAY: Yes.

MR. THOMPSON: I think there is a concern, just to speak to that a little bit, even though it's not directly on my topic but something we looked at when I worked at the Center.

There is an institutional memory problem that sometimes arises in terms of the types of agreements that are made tacitly or orally,

and there are ways to avoid that by doing memorandums of understanding and policy manuals, which most DCPO grantees are encouraged or required to do.

That is something that you can do, without killing the excitement of the program by deadening it with excessive policy.

That's the other side of it. Your policy can sometimes weigh you down like you were saying about too much planning. The flip side of too much planning is too much policy. But there has got to be some balance between creating that institutional memory and memorializing some of the very complicated interconnections between agencies.

JUDGE FINLAY: I would like to add to that, Mark, and that is in reference yesterday to the person who said it's an opportunity for a judge to feel warm and fuzzy. This is an opportunity to work harder than you have ever worked in your lifetime. Wouldn't you agree?

So part of the problem, and I hate to say it, is that there are people in every profession—and the bench is certainly not excluded—who do not want to work twelve, fourteen, fifteen hours a day and weekends and meet with every community organization, meet with every interdisciplinary professional partner. They want to go to work at nine o'clock and, hopefully, don't go home until three or four, you know, and do their job and let me alone.

But, hopefully, on your bench you have some hard-working judges who will rise to the challenge and be interested once they understand and see the evaluations that this is helping the whole system.

QUESTION: If I may, I just wanted to add something. I think there is an important issue that is related, and that is about where the institutionalization is going to come from. We have had courts that have basically been created by innovative people, judges in particular, and the states are becoming more and more interested in these courts and developing these courts.

The question is, are we going to be able to sustain creative courts, innovative courts, that are funded and to a certain extent controlled by state institutions?

I think that we are going to really have to do some thinking about how we can maintain the integrity of these courts, their philosophy, their effectiveness, while also institutionalizing them within state systems.

