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THERAPEUTIC JURISPRUDENCE: AN EXAMINATION OF PROBLEM-SOLVING JUSTICE IN NEW YORK

KATHRYN C. SAMMON*

INTRODUCTION

A. “Problem-solving Justice” in New York

i. A Brief Overview

The theory of problem-solving justice is that the justice system should try to alter the behavior of offenders, give support to victims, and improve public safety in high crime neighborhoods, rather than temporarily impede the acts of offenders or simply process their cases.¹ Problem solving justice is the result of a lengthy process that has focused on the continuous problems that flow from conventional adjudication and high recidivism rates of offenders who have been processed through traditional courts.²

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¹ Ctr. for Ct. Innovation, *A Decade of Change: The First 10 Years of the Center for Court Innovation* 5 (2006), available at http://www.courtinnovation.org/_uploads/documents/10th_Anniversary1.pdf [hereinafter *Decade of Change*]; see Greg Berman & John Feinblatt, *Beyond Process and Precedent: The Rise of Problem Solving Courts*, 41 *JUDGES' J.* 5, 5 (2002) [hereinafter *Beyond Process*] (quoting the ABA's endorsement of the development of problem solving courts to “improve court processes and court outcomes for litigants, victims and communities”).

² See *Beyond Process*, *supra* note 1, at 5 (noting that the change in the courts are coming from within because the judges, attorneys, and administrators are the ones who experience “firsthand . . . the problems of conventional case processing”); see also Greg Berman, “*What is a Traditional Judge Anyway?: Problem Solving in the State Courts*,” 84 *JUDICATURE* 78, 83 [hereinafter *What is a Traditional Judge*] (quoting New York University Professor Ellen Shall, “[t]he reason we got into problem-solving courts is because it wasn't working for a judge to sit there and process, to do McJustice. . . . the system from which the problem-solving courts have emerged was a failure on any count. It wasn't a legal success. It wasn't a social success. It wasn't working.”); John Feinblatt, Greg Ber-

This has been noted by New York State Chief Judge Judith S. Kaye, who wrote:

In many of today's cases, the traditional approach yields unsatisfying results. The addict arrested for drug dealing is adjudicated, does time, then goes right back to dealing on the street. The battered wife obtains a protective order, goes home, and is beaten again. Every legal right of the litigant is protected, all procedures are followed, yet we aren't making a dent in the underlying problem. Not good for the parties involved. Not good for the community. Not good for the courts.³

Rather than focus on process and precedent, problem-solving justice focuses on the outcome.⁴ Problem solving courts are "specialized courts that seek to respond to persistent social, human, and legal problems, such as addiction, family dysfunction, domestic violence, mental illness, and quality-of-life crime."⁵ These courts adapt their processes to suit the sources of the problems, which are driving the actions that bring the wrongdoer to court in the first place.⁶ The focus is on the individual, and the courts

man & Derek Denckla, *Judicial Innovation at the Crossroads: The Future of Problem Solving Courts*, 15 CT. MANAGER 28, 29 (2000) [hereinafter *Crossroads*] ("[B]y and large the emergence of problem-solving courts can be traced to two realities: rising caseloads in the state courts and increasing frustration – both among the public and among system players – with the standard approach to case processing and case outcomes.").

³ *Beyond Process*, *supra* note 1, at 5 (quoting Kaye, C.J.).

⁴ See Jonathan Lippman, New York State Chief Administrative Judge, Achieving Better Outcomes for Litigants in the New York State Courts, Remarks at the Fordham Law School Freerick Center for Social Justice and Dispute Resolution Symposium (Oct. 13, 2006), in 34 FORDHAM URB. L.J. 813, 814 (2007) (stating that the court system in New York "looks to effective outcomes for people rather than merely counting filings and dispositions"); see also *Crossroads*, *supra* note 2, at 30. ("Problem-solving courts seek to achieve tangible outcomes – for victims, for offenders and for society. These include reductions in recidivism, reduced stays in foster care for children, increased sobriety for addicts, and healthier communities.").

⁵ *Crossroads*, *supra* note 2, at 28.

⁶ See Lippman, *supra* note 4, at 817–18 n.8 (discussing how problem-solving courts have changed because they not look to the source of the problems, which includes giving weight to the "broken window" theory of law enforcement which involves taking into more serious consideration petty crimes in hopes of reducing crime rates for more serious crimes); see also Robert V. Wolf, Ctr. for Ct. Innovation, Principles of Problem-Solving Justice 6 (2007), available at http://www.courtinnovation.org/_uploads/documents/Principles.pdf ("[Individualized justice, as one of the key principles, means] [u]sing valid, evidence-based risk and needs assessment instruments . . . [to] link offenders to individually tailored community-based services . . . where appropriate. . . [which] can help reduce recidivism, improve community safety and enhance confidence in justice.").

provide particularized responses designed to change that specific offender's future behavior.⁷

In addition to a focus on the outcome and the individual, problem-solving courts are different from traditional courts in a number of other ways. First, the judges in problem-solving courts have greater interaction with the litigants than judges in traditional courts.⁸ Rather than rely on the adversary system for all of their information, "judges often directly engage defendants as part of their effort to encourage behavior modification."⁹ In fact, one of the current experimental functions of problem solving courts is to reduce the adversarial nature of the courtroom, and encourage prosecutors and defense attorneys to create "mutually agreeable case resolutions."¹⁰ Second, judges utilize community service and other social services as alternative sanctions.¹¹ Problem solving courts seek to increase the availability and selection

⁷ See Lippman, *supra* note 4, at 818. The court system is looking to the future of the individual's behavior so that the system can stop the destructive cycle. *Id.* See also *What is a Traditional Judge*, *supra* note 2, at 81. Judge Judy Harris Kluger speaks of her time spent in traditional courts when she was evaluated by the number arraignments she could do in a day. She stated that her claim to fame was that she arraigned 200 cases in one session and then commented, "[t]hat's ridiculous. When I was arraigning cases, I'd be handed the papers, say the sentence is going to be five days, ten days, whatever, never even looking at the defendant. At a community court, I'm able to look up from the papers and see the person standing in front of me. It takes two or three more minutes, but I think a judge is more effective that way." *Id.*

⁸ See *Upstate Innovation Newsletter*, UPSTATE INNOVATION (Ctr. for Ct. Innovation, Syracuse, N. Y.), Spring 2005, available at <http://www.courtinnovation.org/upstateinnovation.spring04-05.html> (noting that one of the principals of problem-solving justice is the interaction between the judge and the defendant); see also Donald J. Farole, Jr. et al., *Applying the Problem-Solving Model Outside of Problem-Solving Courts*, 89 *Judicature* 40, 40-41 (2005) (stating that problem-solving courts are characterized by the unique element of direct interaction between the judge and the litigant, *inter alia*).

⁹ Greg Berman, Ctr. for Ct. Innovation, *The Hardest Sell? Problem-Solving Justice and the Challenges of Statewide Implementation 3* (2004), available at http://www.courtinnovation.org/_uploads/documents/Hardest%20Sell1.pdf; see also Lippman, *supra* note 4, at 824 (noting that in problem solving courts "the judge is not just a detached arbiter who manages the process and then makes a final decision;" the judge is proactive and hands-on).

¹⁰ Berman, *supra* note 9, at 3; *contra Crossroads*, *supra* note 2, at 32 (explaining that the adversarial nature of traditional courtrooms is still present prior to the offender's agreement to treatment or other sanction and is also present if the offender does not comply with his sanction).

¹¹ See *What is a Traditional Judge*, *supra* note 2, at 82 (Kluger, J.) (noting that judges utilize community service as a sanction); see also Mother Jones, *Good Courts: An Interview with Greg Berman* (June 18, 2005), http://www.motherjones.com/news/qa/2005/06/good_courts.html [hereinafter *Mother Jones*] (listing community service, drug treatment, and job training as alternative sanctions).

of sanctions by offering connections to community-based social service providers, such as centers for drug treatment, health care, job training, adult education, and anger management.¹² Third, problem-solving courts not only refer offenders to appropriate treatment, but they also monitor their treatment.¹³ They rely on “ongoing judicial supervision to help ensure the compliance of offenders with community-based sanctions.”¹⁴ All of these elements have been carefully implemented in order to bring more long-term and significant results to the thousands of cases that pass through the courthouses in New York State each year.¹⁵

ii. Goals

The common goals of all those involved in problem solving courts, including judges, lawyers, and those who created the system, are to reduce crime within the community, eliminate the structural problems of the justice system, improve the community's confidence in the system, and address the underlying problems of victims and defendants, which are oftentimes overlooked in traditional adjudication.¹⁶ Problem solving courts do this by

¹² See Berman, *supra* note 9, at 3. In his article, Berman elaborates on the options offered by alternative sanctions. Moreover, in an interview, Berman described the concept of problem-solving justice.

Instead of utilizing incarceration, it links low-level offenders to visible community restitution projects in the neighborhood that they'd harmed through their criminal behavior. At the same time, it links them to onsite social services like drug treatment, job training, and mental health counseling in an effort to keep them from coming back to court as recidivists.

Mother Jones, *supra* note 11.

¹³ See *What is a Traditional Judge*, *supra* note 2, at 82 (Kluger, J.) (discussing reference and monitoring of people in treatment); see also Mother Jones, *supra* note 11 (“[I]n a problem-solving court, a drug-addicted offender, rather than being sentenced to a short stay in jail or prison, is linked to long-term, judicially monitored drug treatment and required to come back to court on a regular basis to report on their compliance.”).

¹⁴ Berman, *supra* note 9, at 3; see *Crossroads*, *supra* note 2, at 30 (“Drug court judges, for example, closely supervise the performance of offenders in drug treatment, requiring them to return to court frequently for urine testing and courtroom progress reports.”).

¹⁵ See Susan K. Knipps & Greg Berman, *New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, 72 N.Y. ST. B.A.J. 8, 8 (2000) (discussing specialized court objectives to “provide more lasting and meaningful resolutions for thousands of difficult cases that pass each year through the courthouses in New York State”); see also Mother Jones, *supra* note 11 (describing courts' goal as an attempt “to solve the problems that are driving their caseloads rather than just processing people through the system day after day”).

¹⁶ See *Beyond Process*, *supra* note 1, at 6 (acknowledging that judges, prosecutors, and defenders share common goals); see also *What is a Traditional Judge*, *supra* note 2, at 78

combining punishment and assistance in order to improve community safety and prevent recidivism.¹⁷ “Problem solving courts offer a ray of hope to those who want to put an end to ‘revolving door justice’ – the perception that courts recycle the same defendants through the system again and again.”¹⁸

Judge Harris Kluger, Deputy Chief Administrative Judge for Court Operations and Planning, stated that New York’s problem solving courts “look to the issues that bring litigants into the justice system and seek to implement new approaches, including increased judicial oversight and the incorporation of community resources.”¹⁹ “This comprehensive approach increases offender accountability, enhances community safety and improves outcomes while protecting the rights of all litigants.”²⁰

The Center for Court Innovation was created in 1996 to accomplish the goals of problem-solving courts.²¹ The Center’s purpose was to advance innovation in New York’s court system.²² It has

(“While each of these initiatives targets a different problem, they all seek to use the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities.”); Greg Berman & John Feinblatt, Ctr. for Ct. Innovation, *Problem-Solving Courts: A Brief Primer* 3 (2001) [hereinafter *A Brief Primer*], available at http://www.courtinnovation.org/pdf/prob_solv_courts.pdf (noting that all problem solving courts share the same organizing theme – “a desire to make courts more problem-solving and to improve the kinds of results that courts achieve for victims, litigants, defendants and communities”).

¹⁷ See Greg Berman & John Feinblatt, *Problem-solving justice: a quiet revolution*, 86 JUDICATURE 182, 182 (2003) [hereinafter *Quiet Revolution*] (stating courts’ method of combining “punishment and help . . . to improve public safety and prevent recidivism”); see also Mother Jones, *supra* note 11 (illustrating one example where the combination of punishment and help led to greater compliance with court orders and reduction in crime).

¹⁸ See *Beyond Process*, *supra* note 1, at 6. See also *What is a Traditional Judge*, *supra* note 2, at 79 (Kaye, C.J.) Chief Judge Kay explains that part of the reason for the creation of problem-solving courts is because “we get a lot of repeat business. We’re recycling the same people through the system.”

¹⁹ New York State Unified Court System, Problem-Solving Courts Homepage, http://www.nycourts.gov/courts/problem_solving/index.shtml (last visited Feb. 28, 2008).

²⁰ New York State Unified Court System, Problem-Solving Courts Brochure, available at http://www.courts.state.ny.us/courts/problem_solving/PSC-FLYER4Fold.pdf

²¹ Decade of Change, *supra* note 1, at 1, 3 (“The Center is a successful demonstration of how courts can work more efficiently, engage non-traditional partners, and tackle chronic and emerging social problems” (quoting the Citizens Budget Commission, which awarded the Center its prize for Public Sector Innovation)); see Ctr. for Ct. Innovation, About, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=471> (last visited Feb. 28, 2008) (“[T]he Center functions as the court system’s independent research and development arm. . .”).

²² Decade of Change, *supra* note 1, at 1–2. (recognizing that the Center was established to address challenges facing the court system including, “outmoded technology, scarce resources, and the day-to-day responsibility of operating large public institutions”); see

accomplished this goal by operating demonstration projects, producing statistical research on problem solving courts, and providing training initiatives and publications to thousands of practitioners and policymakers.²³ An important characteristic of the center is its unique position as both a public and private structure.²⁴ It is an independent not-for-profit entity, which provides the autonomy necessary for impartial and candid research, but it is also the designated research and development division of the court system, which allows it an insider's access to operators and key policy makers.²⁵

iii. Types of Problem Solving Courts in New York

New York's current court system includes 171 drug treatment courts with another 26 in the planning stage,²⁶ 8 community courts with one in the planning stage,²⁷ 12 mental health courts with three additional courts expected to begin operating in 2008,²⁸ 27 domestic violence courts,²⁹ 38 integrated domestic vi-

Ctr. for Ct. Innovation, *supra* note 21 (acting as a think tank to innovate the criminal justice system).

²³ Decade of Change, *supra* note 1, at 1 (outlining the methods employed by the Center to assist the court); see Ctr. for Ct. Innovation, About, *supra* note 21.

²⁴ Decade of Change, *supra* note 1, at 1 (suggesting that the Center's "unique public-private structure: as an independent not-for-profit," has allowed it to enjoy "agility and autonomy" of a private enterprise, while maintaining "insider's access to key policymakers" as the "designated research and development arm of the court system"); see Ctr. for Ct. Innovation, About, *supra* note 21.

²⁵ Decade of Change, *supra* note 1, at 1, 3.

While the Center works within the court system, it is administered as a project of the Fund for the City of New York, a non-profit operating foundation. Because it is not a formal part of the court bureaucracy, the Center enjoys the best of both worlds: the knowledge and access of inside operators and the independent perspective of outside observers.

Id. at 3.

²⁶ New York State Unified Court System, Drug Treatment Courts Homepage, http://www.nycourts.gov/courts/problem_solving/drugcourts/index.shtml (last visited Aug. 11, 2008).

²⁷ New York State Unified Court System, Community Courts Overview, http://www.courts.state.ny.us/courts/problem_solving/cc/home.shtml (last visited Aug. 11, 2008); see Ctr. for Ct. Innovation, Community Courts, <http://www.courtinnovation.org/index.cfm?fuseaction=Document.viewDocument&documentID=669&documentTopicID=17&documentTypeID=10> (last visited Feb. 22, 2008) (listing all operating community courts in New York State).

²⁸ New York State Unified Court System, Mental Health Courts Overview, http://www.nycourts.gov/courts/problem_solving/mh/home.shtml (last visited Aug. 11, 2008); see Anita Womack-Weidner, *Mental Health Courts: Providing Alternatives to Prison*, UCC BENCHMARKS (Fall 2006), available at <http://www.courts.state.ny.us/>

olence courts with two in the planning stage,³⁰ and 7 sex offense courts currently in operation.³¹

Demonstration Projects are programs that the Center for Court Innovation creates to test new approaches to public safety problems.³² The same concept that applies to problem solving courts applies to the demonstration projects; change the behavior of the offender and focus on results, rather than simply process the cases.³³ “While the Center’s model projects cover a broad range of topics—from juvenile delinquency to the reentry of ex-offenders into society—the approach is always the same: rigorous, collaborative planning and an emphasis on using data to document results and ensure accountability.”³⁴ These projects have achieved real results, such as safer streets and communities, reduced levels of fear in members of those communities, a greater sense of confidence in the justice system, and an overall improved quality of life in the target neighborhoods.³⁵ Currently, in New

publications/benchmarks/issue5/mental-health.shtml (recording New York’s mental health courts, their judicial district, location, and judge).

²⁹ New York State Unified Court System, Domestic Violence Courts, Overview, http://www.courts.state.ny.us/courts/problem_solving/dv/home.shtml (last visited July 24, 2008); see Decade of Change, *supra* note 1, at 16; see Ctr. for Ct. Innovation, Domestic Violence Courts, <http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPage&PageID=600¤tTopTier2=true> (last visited Aug. 11, 2008) (noting that there are almost 30 domestic violence courts operating in New York State).

³⁰ New York State Unified Court System, Integrated Domestic Violence Courts, Overview, http://www.nycourts.gov/courts/problem_solving/idv/home.shtml (last visited Aug. 11, 2008); see Ctr. for Ct. Innovation, Integrated Domestic Violence Courts, <http://www.courtinnovation.org/index.cfm/fuseaction/Page.viewPage/pageId/604> (last visited July 21, 2008) (stating that “there are more than 30 integrated domestic violence courts” operating in New York counties).

³¹ See New York State Unified Court System, Sex Offense Courts, Overview, http://www.nycourts.gov/courts/problem_solving/so/home.shtml (last visited Aug. 11, 2008).

³² See Ctr. for Ct. Innovation, Demonstration Projects, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=472> [hereinafter Demonstration Projects] (last visited Feb. 22, 2008) (explaining that demonstration projects are “innovative approaches” to ameliorate different public safety problems that plague New York); see also Sarah Bryer et al., *Center For Court Innovation*, 183 PLI/CRIM 49, 51 (1999) (describing demonstration projects as “new court prototypes to demonstrate how courts can tackle chronic and emerging social problems”).

³³ See Demonstration Projects, *supra* note 32 (stating that demonstration projects seek to alter behavior problems of offenders instead of punishing them); see also Bryer et al., *supra* note 32, at 51 (explaining that demonstration projects “means building model courts from scratch, including program design, technology, research and fundraising”).

³⁴ Demonstration Projects, *supra* note 32.

³⁵ *Id.* (noting that demonstration projects have been extremely successful in decreasing violence and making streets safer); see Bryer *supra* note 32, at 51–52 (describing the suc-

York, there are 25 Demonstration Projects, and there are many more in the planning stages.³⁶

cess of the different types of demonstration projects in areas of addiction, domestic violence, and child neglect).

³⁶ Demonstration Projects, *supra* note 32; *see* Decade of Change, *supra* note 1, at 18. Complete List from Demonstration Projects & Decade of Change: (1) Midtown Community Court (combines punishment and help, holding quality-of-life offender accountable and helping them avoid re-offending), (2) Brooklyn Treatment Court (Link felony drug offenders to substance abuse treatment), (3) Brooklyn Felony Domestic Violence Court (seeks to improve victim safety while improving offender accountability), (4) Manhattan Family Treatment Court (designed to work with addicted parents and guardians charged with neglect), (5) Crown Heights Community Mediation Center (seeks to reduce conflict in the ethnically diverse neighborhood of Crown Heights, Brooklyn), (6) Red Hook Community Justice Center (brings criminal, family, and housing cases before a single judge and provides on-site social services to help solve neighborhood problems), (7) Harlem Community Justice Center (applies the community court model to family and housing court matters while offering a range of programs for young people at risk of offending), (8) Bronx Juvenile Accountability Court (provides young people between the ages of 10 and 15 with an alternative to placement in a state-run juvenile facility), (9) Harlem Juvenile Reentry Network (a community based reentry program for juveniles returning from state placement), (10) Brooklyn Youth Offender Domestic Violence Court (addresses exclusively misdemeanor domestic violence cases among teenagers between the ages of 16 and 19), (11) Queens Community Cleanup (community restoration program for Long Island City and Jamaica, puts lo-level offenders to work repairing conditions of disorder), (12) Youth Justice Board (an after-school program for New York City teenagers, meets over a 10 month period to study and propose solutions to public safety issues affecting New York City young people), (13) Harlem and Red Hook Youth Courts (use positive peer pressure to help young people avoid further involvement in the justice system), (14) Bronx Community Solutions (brings the community court model of combining punishment and help to the entire Bronx criminal court, which handles 50,000 misdemeanor cases each year), (15) Blueprint for Change (a year-long strategic planning process focused on improving permanency for abused and neglected children involved in the child welfare system), (16) Brooklyn Mental Health Court (aims to improve the court system's ability to identify, assess, evaluate and monitor offenders with mental illness, create effective linkages between the criminal justice and mental health systems, and improve public safety by ensuring that participants receive high quality community-based services), (17) Child Witness Program (provides mental health support and referrals to children and adolescents exposed to violent crime), (18) Harlem Youth Justice Center (seeks to address youth crime in East and Central Harlem by working intensively with young people who have engaged in delinquent behavior, providing them with the tools they need to get on the right track and avoid further offending), (19) Juvenile Intervention Court (works with young people under 16 arrested for drug offenses and other low-level delinquency charges; it is positioned to link respondents to services in the community and to more closely monitor participant compliance), (20) Parole Reentry Court (helps parolees returning to the community make the transition from life in prison to responsible citizenship), (21) Red Hook Public Safety Corps (an AmeriCorps community service program that seeks to improve the quality of life in Red Hook through crime prevention and victim assistance projects), (22) Youth Justice Board (brings together young people to study and propose solutions to the juvenile justice and public safety challenges that most affect them, providing a credible voice to young people in the public debate about juvenile justice policy in New York City), (23) QUEST (Queens Engagement Strategies for Teens is a community-based that provides an alternative to detention for youth who have delinquent matters

I. PROBLEM SOLVING COURTS VERSUS TRADITIONAL COURTS

A. Drug Treatment Courts in New York

i. An Overview of the Program

Drug Treatment Courts in New York have been described as a “dramatic intervention process.”³⁷ Drug Courts are the response to a national epidemic.³⁸ Studies have shown that three-quarters of the defendants in urban areas test positive for drugs at the time of their arrest, and almost half of all prison commitments in New York State are for drug offenses.³⁹ “Of the estimated 70-85 percent of all state inmates who need substance abuse treatment, only 12 percent of them receive some form of treatment.”⁴⁰ Using traditional methods of adjudication, “[m]ore than half of drug offenders placed on probation or parole recidivate within three years.”⁴¹ Drug courts seek to break the cycle of addiction, crime, and repeat-incarceration by combining drug treatment with ongoing judicial supervision.⁴² Drug treatment courts offer non-

pending in Queens Family Court), (24) Integrated Domestic Violence Courts (a “one family/one judge” approach where one judge handles criminal domestic violence cases and related family issues), (25) Far Rockaway Youth Court (trains local teenagers to serve as judges, jurors, and attorneys, thereby using positive peer pressure to ensure that young people committing low-level offenses pay back the community).

³⁷ Drug Treatment Courts Homepage, *supra* note 26, at “Drug Treatment Courts.”

³⁸ *See id.* (noting that Drug Treatment Courts were created in response to the “endless cycle of addiction and recidivism needed to be broken to reduce drug use and drug-related crime”); *see also* C. West Huddleston III, U.S. Dep’t of Justice, *Drug Courts: An Effective Strategy for Communities Facing Methamphetamine* 2 (2005), available at <http://www.ojp.usdoj.gov/BJA/pdf/MethDrugCourts.pdf> (“In many communities, the central response to [the drug] crisis is the drug court, which is unprecedented in its ability to effectively intervene with the methamphetamine-abusing population and unequalled by any other criminal justice response.”).

³⁹ *See* Knipps & Berman, *supra* note 15, at 9 (highlighting that “New York’s drug treatment courts are a response to these statistics”); *see also* Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. PUBL. ECON. 2043, 2046–47 (2004), available at <http://pricetheory.uchicago.edu/levitt/Papers/KuziemkoLevitt2004.pdf> (stating the results of their study to show that “[t]he most striking result . . . is that new drug commitments to state prisons increased more than 10-fold in less than a decade,” whereas “[n]on-drug arrests have been essentially flat over this time period”).

⁴⁰ Derek Denckla & Greg Berman, Ctr. for Ct. Innovation, *Rethinking the Revolving Door: A Look at Mental Illness in the Courts* 3 (2001), available at http://www.courtinnovation.org/_uploads/documents/rethinkingtherevolvingdoor.pdf.

⁴¹ Knipps & Berman, *supra* note 15, at 9.

⁴² *See* Michael Rempel et al., Ctr. for Ct. Innovation, *The New York State Adult Drug Court Evaluation: Policies, Participants and Impacts* 11 (2003), available at

violent drug-addicted offenders the opportunity to earn dismissal of their charges, or at least a less serious charge for their offense, through successful completion of a court-ordered drug treatment program.⁴³ Those who fail the program are sentenced to jail or prison.⁴⁴

Unlike traditional courts, drug courts focus on changing future behavior and promoting sobriety.⁴⁵ As in other problem-solving courts, judges play an active role in the defendant's recovery, and the process is considered somewhat less adversarial, with the prosecution and defense attorneys working toward the same goal.⁴⁶ The process that takes place in drug treatment courts necessarily involves coordination between defense attorneys, prosecutors, treatment providers, education providers, and law enforcement officials.⁴⁷ "Rules of participation are defined clearly in a contract agreed upon by the defendant, the defendant's attorney, the district attorney and the court."⁴⁸

The participants voluntarily enter into the program, and they are all non-violent addicted offenders that have been deemed ap-

http://www.courtinnovation.org/_uploads/documents/drug_court_eval.pdf (explaining that drug treatment courts are based on an effective interplay between treatment, monitoring, and direct interaction with the supervising judge); see also Knipps & Berman, *supra* note 15, at 10 (quoting a graduate of the program who stated, "I had spent every day stealing for the money to buy drugs, and every free minute getting high. . . . I got caught numerous times, but still I couldn't stop. I had no support system, and no incentive to stop. Drug court finally provided me with both").

⁴³ See Knipps & Berman, *supra* note 15, at 9 (describing the model that New York's treatment courts were based on and what these treatment courts now offer); see also N. Y. State Comm'n on Drugs and the Courts, *Confronting the Cycle of Addiction & Recidivism: A Report to Chief Judge Judith S. Kaye* § III (2000), available at <http://www.courts.state.ny.us/reports/addictionrecidivism.shtml#110> (noting that "[p]rosecutors in Drug Courts are willing to allow charges to be reduced or dismissed upon successful treatment").

⁴⁴ Rempel et al., *supra* note 42, at ix; Alan I. Leshner, *Treatment Option for Drug Offenders is Consistent With Research Findings*, 72 N.Y. ST. B.J. 53, 54 (2000).

⁴⁵ See Knipps & Berman, *supra* note 15, at 10 (focusing on future behavior rather than past deeds); see also John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 282 (2000) (emphasizing that the goal of problem-solving courts is to change the future behavior of litigants and improve the well-being of communities).

⁴⁶ See Knipps & Berman, *supra* note 15, at 9 (highlighting the collaborative efforts of judges, defense attorneys and prosecutors in ensuring defendant's sobriety); see also Feinblatt et al., *supra* note 45, at 282-83 (writing that drug court judges continually review the progress of offenders).

⁴⁷ Drug Treatment Courts Homepage, *supra* note 26 (explaining the importance of cooperation between all parties and non-parties); see Lippman, *supra* note 4, at 825 (2007) (describing the coordination between the parties).

⁴⁸ Drug Treatment Courts Homepage, *supra* note 26.

appropriate for the program by the court.⁴⁹ In return for the potential reduction of their sentence, offenders are given the option of entering into the court-supervised treatment program.⁵⁰ The judge rigorously monitors offenders' participation in drug treatment and other mandated services.⁵¹ Offenders must return to court frequently to report on their progress in treatment, to submit to drug tests, and to confirm their compliance with court orders.⁵² Sanctions are imposed when program requirements are not met, while rewards are dispensed when treatment goals are achieved.⁵³ Judges use a wide variety of sanctions, including drug treatment, community restitution projects, job training, and mental health counseling.⁵⁴ If sobriety is achieved, everyone wins: "the community is safer, the defendant has improved life prospects and the justice system has one fewer future recidivist to process."⁵⁵

⁴⁹ *Id.* ("What distinguishes drug courts is their uniquely collaborative approach to treatment: upon voluntary entry into court-supervised programs, appropriate non-violent addicted offenders become part of a dramatic intervention process.").

⁵⁰ See New York State Unified Court System, Drug Treatment Courts, Overview, <http://www.nycourts.gov/ip/drugcourts/overview.shtml> (last visited Feb. 26, 2008); see also Lisa R. Nakdai, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557, 580–81 (2001) ("The Commission proposed participation in drug treatment programs as an alternative to a sentence of probation or prison.").

⁵¹ See Lippman, *supra* note 4, at 823 (stressing the significance of involving offenders in community and social services); see also Feinblatt et al., *supra* note 45, at 282–83 (describing the crucial role of judges in the drug treatment process).

⁵² *Quiet Revolution*, *supra* note 17, at 182; see also Lippman, *supra* note 4, at 824–25 (attributing the effectiveness of problem-solving courts to the emphasis placed on "offender accountability and compliance with court orders," which emphasis is partly evidenced by offenders' frequent appearances in court).

⁵³ See Knipps & Berman, *supra* note 15, at 10 (explaining that the "active role" played by judges include rewarding and sanctioning offenders based on offenders' compliance (or non-compliance) with program requirements); see also John Feinblatt et al., *supra* note 45, at 282–83 (noting that review of offenders' compliance will result in either court-imposed rewards or sanctions).

⁵⁴ See *Quiet Revolution*, *supra* note 17, at 182 (describing the array of possible sanctions); see also Knipps & Berman, *supra* note 15, at 8 (commenting that a judge may impose "sanctions," which serve to both punish and benefit the offender, as in public restitution projects and social services).

⁵⁵ See Knipps & Berman, *supra* note 15, at 10 (noting that drug treatment courts are aimed at the "promotion of defendant sobriety through rigorous judicial monitoring of drug treatment").

ii. Summary of the Study "The New York State Adult Drug Court Evaluation Policies, Participants and Impacts"

The Center for Court Innovation, in collaboration with the New York State Unified Court System, "has spent the past three years documenting policies, participant characteristics, and performance of participants in eleven of the state's oldest and largest drug courts."⁵⁶ The report evaluated adult drug courts in New York State as compared to traditional courts in the State.⁵⁷ The participant population was drawn from four courts in large urban counties of New York City (Bronx, Brooklyn, Manhattan, and Queens), one in a suburban county (Suffolk), three in medium-sized cities (Syracuse, Rochester, and Buffalo), and three in small city/semi-rural areas (Tonawanda, Lackawanna, and Ithaca).⁵⁸

The report outlines the impact of six drug courts on recidivism, and identifies characteristics of participants and features of the programs that indicate a likelihood of success in drug court outcomes.⁵⁹ The recidivism analysis compares the reconviction rates of drug court participants from the six sample courts with similar defendants who did not enter the drug court.⁶⁰ "Comparison defendants had to have no contact with the drug court on the instant case, meet the same paper eligibility criteria as drug court participants, and be convicted on the instant case."⁶¹ The comparison group was further refined to ensure that each comparison defendant closely matched the drug court participant across a wide range of important background characteristics, such as age, race/ethnicity, sex, specific charge, and criminal history.⁶² The time periods analyzed were three years following the initial arrest and a report on progress one-year post-program, comparing

⁵⁶ Rempel et al., *supra* note 42, at ix.

⁵⁷ *See id.* ("At each of six sites [incorporated into the study], the recidivism analyses compare the reconviction rates of drug court participants with similar defendants *not* entering the drug court [*i.e.*, those defendants going through the traditional court system].").

⁵⁸ *Id.* (stating that the report was based on a study of eleven drug courts located throughout New York State).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at x.

⁶² Rempel et al., *supra* note 42, at x (discussing that the comparison samples utilized a matching system which was one of the strongest methodological alternatives to random assignment so as to ensure that each court's final comparison sample matches the court's participant sample across ranging characteristics).

drug court participants and comparison defendants from traditional courts.⁶³

a. Results

At three years post-arrest, all six drug courts produced recidivism reductions as compared to conventional courts.⁶⁴ The percentage of drug court participants with a new conviction ranged from 29 percent to 56 percent, compared to the higher rate of recidivism of the comparison defendants who ranged from 41 to 65 percent.⁶⁵ Depending on the drug court, recidivism reductions ranged from 13 percent to 47 percent, resulting in an average of 29 percent reduction of recidivism.⁶⁶

At one year post-program, drug court participation led to a lower probability of recidivism.⁶⁷ This was not the expected outcome, since judicial supervision is discontinued once the participant graduates.⁶⁸ The percentage of drug court participants with a new conviction one year post-program ranged from 12 percent to 30 percent compared to comparison defendants whose one year post-program conviction rates ranged from 23 percent to 37 percent.⁶⁹ It is significant to note that “drug court participants” include those who failed as well as those who graduated.⁷⁰ Depending on the drug court, post-program recidivism reductions ranged from 19 percent to 52 percent, averaging a 32 percent reduction

⁶³ *Id.* at ix (highlighting that this analysis utilized some of the longest measurement periods in research literature).

⁶⁴ *Id.* at 274 (showing that each of the six drug courts showed a reduction in post-arrest recidivism by statistical chart).

⁶⁵ *Id.*

⁶⁶ *Id.* at 274 (comparing drug court participants and comparison cases and extrapolating that the drug court in Syracuse showed difference in percentage of defendants with new convictions of 12.5% ~ 13%, the drug court in Queens showed difference in percentage of defendants with new convictions of 47.27% ~ 47% and the average of the two is 29.89% ~ 30% difference between the drug court participants and comparison cases for the two respective drug courts).

⁶⁷ *Id.* at x (stating “[t]he six drug courts generated an average 29% recidivism reduction over the three-year post-arrest period and an average 32% reduction over the one-year post-program period”).

⁶⁸ Rempel et al., *supra* note 42, at 276 (noting the assumption that recidivism was low due to the high level of judicial supervision).

⁶⁹ *Id.* (quoting recidivism rates of drug court participants as compared to comparison group).

⁷⁰ *Id.* at xiii (noting that not all participants in the drug court program graduate).

of recidivism.⁷¹ This indicates positive long-term impacts continuing beyond the phase of active judicial supervision.⁷²

Another interesting finding was that, while drug court graduates are far less likely to recidivate than comparison defendants, drug court failures are just as likely, and sometimes even more likely, than comparison defendants to recidivate in four out of the six courts analyzed.⁷³ The percentage of drug court *graduates* with a new conviction one year post-program was extremely low, ranging from 4 percent to 12 percent, while the percentage of drug court *failures* reached recidivism rates ranging from 22 percent to 40 percent, compared to the 23 percent to 37 percent of comparison defendants.⁷⁴ The reconviction rate one year post-program for graduates was 71 percent less than that of non-participants across six courts.⁷⁵ This indicates that the benefits of drug court participation largely accrue to those who successfully graduate.⁷⁶

Further positive results of drug courts were that their cases reach initial disposition more quickly than conventional courts, which means that participants spend significantly less time between their initial arrest and program entry than those adjudicated in traditional courts.⁷⁷ Since retention of participants in the program not only indicates success in treatment, but also pre-

⁷¹ *Id.* at x (summarizing the study's findings of drug court participations impact on recidivism).

⁷² *Id.* at xi (noting positive impacts beyond the active judicial supervision stage); Christopher P. Krebs et al., *Assessing the Long-Term Impact of Drug Court Participation on Recidivism with Generalized Estimating Equations*, 91 DRUG & ALCOHOL DEPENDENCE 57, 66 (2007) (stating that although strict supervision conditions make it difficult to succeed during the program period they are effective in long-term studies).

⁷³ Rempel et al., *supra* note 42, at 277 (arguing that drug court failures are just as or more likely to recidivate than those who did not participate at all); Sheldon X. Zhang et al., *Preventing Parolees From Returning to Prison Through Community-Based Reintegration*, 52 CRIME & DELINQ. 551, 568 (2006), available at <http://cad.sagepub.com/cgi/reprint/52/4/551.pdf> (noting higher recidivism rates for parolees who did not complete drug education programs as opposed to the non-drug education parolee population).

⁷⁴ Rempel et al., *supra* note 42, at 278 (quoting from the study's finding on post drug court participation convictions).

⁷⁵ Michael Rempel, Dana Fox-Kralstein, & Amanda Cissner, *Drug Courts an Effective Treatment Alternative*, 19 CRIM. JUST. 34, 35 (2004) [hereinafter *Treatment Alternative*] (discussing the importance of drug court program graduation).

⁷⁶ Rempel et al., *supra* note 42, at x (providing that all six drug courts analyzed in the article produced recidivism reductions for defendants who completed the program, as compared with conventional case processing).

⁷⁷ *Id.* at xi (stating "Drug court cases reach initial disposition more quickly than conventional court cases.").

dicts future success in reduction of recidivism, a key finding was that drug courts generally produce higher retention rates than community-based treatment programs accepting a combination of voluntary and court-mandated treatment participants.⁷⁸

Another important distinction between drug treatment courts and traditional courts is the possibility of second chances. The study revealed that relapse and noncompliance are common, even among those who eventually graduate from the program.⁷⁹ At least half of all graduates in seven of eight courts had at least one positive drug test, and many participants had several positive drug tests.⁸⁰ Prior to drug courts, judges would mandate addicted offenders to treatment, but would generally re-sentence them to jail after just one or two relapses.⁸¹ “This highlights the drug courts according multiple chances to participants experiencing early problems.”⁸²

While age, prior convictions, and the type of current conviction all played a part in predicting success, a more anticipated result was that socioeconomic status played a large role in predicting success.⁸³ In all eleven courts, nearly half of the participants were neither employed nor in school at intake and in seven of the courts more than a quarter of participants were currently or for-

⁷⁸ *Id.* at xii; see *Treatment Alternative*, *supra* note 75, at 34.

After one year, more than 60 percent of participants in eight of 11 drug courts studied either successfully graduated or were still active in treatment. The same eight of 11 produced a three-year retention rate of more than 50 percent. By comparison, a sampling of inpatient treatment programs nationwide showed that just 10 to 30 percent of mostly voluntary participants had remained active in treatment after merely the first year.

Id.

⁷⁹ Rempel et al., *supra* note 42, at xiv (discussing major findings pertaining to the treatment and recovery period).

⁸⁰ *Id.*

⁸¹ *Treatment Alternative*, *supra* note 75, at 35; see Meghan Porter, *Proposition 36: Ignoring Amenability and Avoiding Accountability*, 21 BYU J. PUB. L. 531, 555 (2007) (noting that California Proposition 36 was amended to provide judges the ability to put relapsing offenders in jail to “improve outcomes and promote accountability”).

⁸² Rempel et al., *supra* note 42, at xiv.

⁸³ See *id.* at xiii (“In all eleven courts, nearly half of the participants (and a much higher percentage in several) were neither employed nor in school at intake. More than a quarter of participants were currently or formerly homeless in seven courts.”); see also Harvard Law Review, *Developments in Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1898, 1901 n.23 (1998) (citing William N. Brownsberger, *Prevalence of Frequent Cocaine Use in Urban Poverty Areas*, 24 CONTEMP. DRUG PROBS. 349, 359–60 (1997) (“finding that although cocaine use is equally prevalent across socioeconomic classes, ‘frequent cocaine use (weekly or more often) is far more prevalent in urban poverty areas than elsewhere’”).

merly homeless.⁸⁴ This exemplifies how important it is to maintain the other problem-solving systems such as those that focus on job training, education, and reentry programs.⁸⁵

iii. Cost/Benefit Analysis of Drug Courts

As of April 2008, a total of 48,102 individuals have participated in the drug treatment program and 17,866 participants have graduated.⁸⁶ A survey taken in August of 2004 indicated that 380 drug-free babies had been born to participants of drug treatment courts.⁸⁷ Research has shown that participants in these court-ordered drug treatment programs succeed at twice the rate of those who entered treatment voluntarily.⁸⁸ This reduces the problem of “revolving door justice,” and allows the State to save money, since it no longer has to prosecute, defend and repeatedly incarcerate the same people.⁸⁹ Drug treatment courts have “helped move thousands of people from addiction to sobriety and from crime to stable community living.”⁹⁰ Although you cannot put a price on improving someone’s life,⁹¹ it is important to note that these treatment courts accomplish their goals “at a fraction of the cost of incarceration.”⁹² “[I]t is clear that drug courts work

⁸⁴ Rempel et al., *supra* note 42, at xiii.

⁸⁵ See Rempel et al., *supra* note 40, at xiv (noting supplemental services in the areas of employment, education, vocational training, housing, or parenting may be helpful in ensuring the effectiveness of the drug court treatment intervention); see also Lippman, *supra* note 4, at 819 (discussing the importance of mental health counseling, GED classes and job training in helping offenders to avoid recidivism).

⁸⁶ Drug Treatment Courts, Overview, *supra* note 50.

⁸⁷ *Id.*

⁸⁸ See Lippman, *supra* note 4, at 825; see also CARSON FOX & WEST HUDDLESTON, DRUG COURTS IN THE U.S. 5, <http://usinfo.state.gov/journals/itdhr/0503/ijde/fox.htm> (last visited Feb. 24, 2008) (“The most recent science-based literature on drug and alcohol treatment shows that coerced treatment clients actually perform better than those entering voluntarily.”).

⁸⁹ See Lippman, *supra* note 4, at 825 (commenting on the saving of judicial resources by not having to “incarcerat[e] the same people over and over again”); see also Paul Von Zielbauer, *Court Treatment System Is Found to Help Drug Offenders Stay Clean*, N.Y. TIMES, Nov. 9, 2003, at § 4 (“New York drug courts . . . have saved an estimated \$254 million in prison-related expenses. . .”).

⁹⁰ *Crossroads*, *supra* note 2, at 32.

⁹¹ See Knipps & Berman, *supra* note 15, at 9 (quoting one graduate as saying, “I didn’t just get arrested – I got saved.”).

⁹² Knipps & Berman, *supra* note 15, at 9; Vickie Baumbach, *The Operational Procedure of Drug Court: Netting Positive Results*, 14 TRINITY L. REV. 97, 109 (2007) (explaining studies of drug courts that describe them as cost effective).

much better and cost far less than traditional approaches.”⁹³ Both qualitatively and quantitatively, drug courts have given real hope in preserving public order and helping addicts turn their lives around.

B. Community Courts in New York

i. An Overview of the Program

Because of the high caseload in traditional courts, and since more serious crimes had to be addressed, nearly half of all misdemeanor cases were being resolved without any formal sanction beyond “time served.”⁹⁴ Community courts were created with the intent of addressing high volumes of low-level crime, such as prostitution, vandalism, shoplifting, minor drug possession and other petty offenses that degrade the quality of life for businesses and residents.⁹⁵ Like other problem-solving courts, community courts try to help solve the problems that are leading to the criminal behaviors by linking offenders to drug treatment, job training, health care and other social services.⁹⁶ These courts try to merge conventional punishments with alternative sanctions and on-site treatment and training in an attempt to break the continuous cycle of crime.⁹⁷ “They are a collaboration between tradi-

⁹³ Lippman, *supra* note 4, at 825 (discussing an Oregon study that concluded every dollar invested in drug courts ultimately yields ten dollars in savings from reduced incarceration, victimization and crime).

⁹⁴ Knipps & Berman, *supra* note 15, at 8; see Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 *FORDHAM URB. L.J.* 315, 337–38 (2005) (discussing creation of problem-solving courts and the increase in misdemeanor cases in New York courts).

⁹⁵ Knipps & Berman, *supra* note 15, at 8 (describing New York’s first venture into problem-solving courts, the Midtown Community Court); Dana Kraistein, Ctr. for Ct. Innovation, Community Court Research: A Literature Review 1, 2 (2005), available at http://www.courtinnovation.org/_uploads/documents/ccresearch.pdf (stating the goals of the Midtown Community Court).

⁹⁶ Knipps & Berman, *supra* note 15, at 8; Ziedman, *supra* note 95, at 336 (stating that problem solving courts focus on changing future behavior of litigants and the future well-being of communities).

⁹⁷ New York State Unified Court System, Community Courts, Overview, http://www.nycourts.gov/courts/problem_solving/cc/home.shtml [hereinafter Community Courts, Overview] (last visited July 22, 2008); see John Feinblatt & Greg Berman, Ctr. for Ct. Innovation, Community Court Principles: A Guide For Planners 9 (2000), available at http://www.courtinnovation.org/_uploads/documents/Communitycourtprinciples.pdf [hereinafter Community Court Principles] (explaining that offenders with more extensive criminal histories and those less likely to complete their sentences are assigned to

tionally separate entities, including citizens, criminal justice agencies, businesses, local civic organizations, government entities, and social service providers which results in neighborhood-focused problem solving.”⁹⁸

The goals of community courts are to respond to low-level crime “fairly, visibly, and in a manner that was meaningful to victims, defendants and the community.”⁹⁹ Community courts attempt to address local concerns in ways that increase engagement between citizens and the court, increase confidence in the criminal justice system, and enhance appreciation of how crime affects victims and communities.¹⁰⁰ Some community courts seek to re-engineer the relationship between the court and the community by incorporating local residents into every level of its operation.¹⁰¹ There is wide variety in the types of cases each community court tackles; it all depends on the local needs of the specific community.¹⁰² Examples of the types of cases handled by community courts are prostitution, landlord-tenant disputes,

projects that take place in the court house and those considered lesser risks are assigned more visible outdoor projects).

⁹⁸ Community Courts, Overview, *supra* note 98.

⁹⁹ Knipps & Berman, *supra* note 15, at 8.

¹⁰⁰ See Community Courts, Overview, *supra* note 98 (describing that the sentencing of low-level offenders to community service is one way that alternative sanctions improve the quality of life for the rest of the community); Community Court Principles, *supra* note 97, at 3 (highlighting other principles of community court, such as bridging the gap between communities and courts and helping offenders deal with problems that lead to crime).

¹⁰¹ See Decade of Change, *supra* note 1, at 5–6 (noting that the community advisory board helps oversee the Red Hook project, and the 50-member AmeriCorps program actively engages local residents in hands-on community service projects); see also M. Somjen Frazer, Ctr. for Ct. Innovation, The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center 8 (2006), available at http://www.courtinnovation.org/_uploads/documents/Procedural_Fairness.pdf (commenting that all court actors work collaboratively with social workers and other clinical staff to identify appropriate social services for adult defendants, juvenile delinquents, and other litigants).

¹⁰² See Community Court Principles, *supra* note 97, at 1 (explaining that community courts are not designed to be cookie-cutter models because certain quality-of-life offenses that fuel community courts in some places may not be the conditions that bring about community courts in other places); see also MICHELE SVIRDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPACTS, COST AND BENEFITS OF THE MIDTOWN COMMUNITY COURT 6 (2000), http://www.ncsconline.org/WC/Publications/Res_CtComm_MidtownExec_SumPub.pdf [hereinafter DISPENSING JUSTICE LOCALLY] (finding that the differences between the Midtown and Downtown Community Courts in the frequency of secondary jail were strongest for prostitution and drug charges).

truancy, public urination, and unlicensed street vending.¹⁰³ Community courts provide quicker dispositions and innovative sanctions, show observable compliance with court-ordered sanctions and sentences, increase community access to the criminal justice system, and improve the quality of life for victims, offenders and the entire community.¹⁰⁴

Offenders are sentenced to perform a variety of public restitution projects, for example, cleaning up local parks, painting over graffiti and sweeping neighborhood streets.¹⁰⁵ Community courts use a wide range of non-traditional programs, such as job training and placement, drug treatment, community mediation and homeless outreach.¹⁰⁶ The court rigorously monitors all of these programs in order to address the problems that often bring about individuals' criminal behavior.¹⁰⁷ Community courts also offer services specifically targeted for youth including tutoring and

¹⁰³ See Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma'am: What We Know and Don't Know About Problem-Solving Courts*, 30 FORDHAM URB. L. J. 1027, 1037 (2003) (discussing quality-of-life improvements from community court can range from concrete (less graffiti) to the intangible (how people relate to each other)); see also DISPENSING JUSTICE LOCALLY, *supra* note 102, at 1 (noting that the purpose behind the Midtown Community Court was to provide effective and accessible justice for quality-of-life crimes – low level offenses like prostitution, shoplifting, minor drug possession, turnstile jumping, unlicensed vending and disorderly conduct – that often arise in the Times Square area and the surrounding residential neighborhoods of Clinton and Chelsea).

¹⁰⁴ See *What is a Traditional Judge*, *supra* note 2, at 81 (noting in community court, judges are not evaluated on how many arraignments can be completed in one session); see also Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 368 (2005) (concluding community justice will promote voluntary compliance with the law in communities).

¹⁰⁵ See Knipps & Berman, *supra* note 15, at 8 (specifying programs offenders complete as part of their sentence); see also Lanni, *supra* note 104, at 374 (highlighting one example where offenders remove graffiti and beautify public parks within communities).

¹⁰⁶ See Knipps & Berman, *supra* note 15, at 8 (listing various offender programs); see also Lanni, *supra* note 104, at 374 (noting other programs include walk-in youth programs, GED classes and counseling groups).

¹⁰⁷ See Jeffrey Fagan & Victoria Malkin, *Special Series: Problem Solving Courts and Therapeutic Jurisprudence: Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L. J. 897, 938 (2003) (commenting court directors hope offenders get services they need, that compliance with offender guidelines are monitored effectively, and the "revolving door" attitude is extinguished); see also Knipps & Berman, *supra* note 15, at 8 ("Domestic violence courts rigorously monitor the behavior of defendants, requiring them to return to court regularly while their cases are pending – whether they are in custody, on probation or released on bail.").

mentoring programs, job readiness, and substance abuse and HIV prevention.¹⁰⁸

ii. Summary of the Study: "Community Court Research: A Literature Review"

Facing assessment of tangibles and intangibles, it is very difficult to evaluate the benefits of community courts.¹⁰⁹ The methods of research consisted of community surveys, for example, phone interviews, door-to-door surveys and focus groups, all designed to assess public opinion of community court success.¹¹⁰ In addition to community surveys, some research has included offender interviews and service provider interviews in order to gather perceptions and opinions of participants, court staff, and treatment providers.¹¹¹ The research also consisted of administrative and court data from two of the community courts, which were subject to larger-scale quantitative analysis.¹¹²

a. Results

The community courts accomplished one of their goals by reducing the number of "walks" given for quality-of-life crimes.¹¹³ In one of the community courts, between 1 and 12 percent of offenders were given a "walk," as compared to the local traditional court, where numbers reached 23 to 55 percent for the same crimes.¹¹⁴ In addition, offenders in the community court were at least twice as likely to receive a community or social service sentence compared to those in the traditional court.¹¹⁵ Compliance

¹⁰⁸ See Knipps & Berman, *supra* note 15, at 8 (listing various offender programs); see also Lanni, *supra* note 104, at 374 (naming other programs available to both offenders and to the community at large).

¹⁰⁹ See Lanni, *supra* note 104, at 381 (explaining that although community justice programs have not been extensively studied they share similar problems); see also Kraistein, *supra* note 95, at 1, 3 (proposing that varying models adopted by different courts hinder effective ways to measure community court goals).

¹¹⁰ See Lanni, *supra* note 104, at 379 (finding assessment of community justice programs raises numerous questions on how to measure success); see also Kraistein, *supra* note 95, at 1, 3 (noting various methods have been used, including conducting community surveys, gathering administrative/court data and assessing cost-benefit analyses).

¹¹¹ See Kraistein, *supra* note 95, at 3-4 (noting perceptions and experiences of offenders).

¹¹² *Id.* at 1 (applying data from two Hennepin studies and Midtown studies).

¹¹³ *Id.* at 2 (including sentences such as time served or conditional discharges).

¹¹⁴ *Id.* (examining cases held at Manhattan's centralized criminal court).

¹¹⁵ *Id.* (contrasting to offenders sentenced in downtown Manhattan).

rates for community-based sanctions were up to 75 percent in community courts, which is about 50 percent higher than some traditional courts and is the highest compliance rate in all of New York City.¹¹⁶ Community perceptions of the community courts were also very high. Community members were reportedly willing to reallocate their tax dollars, and in some cases pay more taxes, to help support a community court.¹¹⁷ A survey of those who had a case at one community court reported 56 percent had a positive experience.¹¹⁸

The studies showed that community courts produced speedier case processing.¹¹⁹ Although the community courts required a greater number of appearances prior to disposition¹²⁰ than traditional courts, they still had shorter wait periods between the time of filing the case to disposition.¹²¹ Community courts also allow for a dramatic decrease in arrest-to-arraignment time.¹²² Most importantly, though, the study that analyzed the impact on crime in the community documented very encouraging outcomes.¹²³ The study showed that there was a significant drop in local street crime, documenting prostitution arrests down 56 percent, and illegal vending arrests down 24 percent.¹²⁴

¹¹⁶ *Id.* (suggesting benefits in sentencing efficacy compound types of sentences handed out).

¹¹⁷ Kraistein, *supra* note 95, at 2 (illustrating public awareness of benefits of community courts).

¹¹⁸ *Id.* at 4 (“[T]he Red Hook community survey (Moore 2004) found that the majority (56 percent) of those who had a case at the Justice Center reported a positive experience.”).

¹¹⁹ *Id.* at 3 (explaining both the Midtown and the 2000 Hennepin studies reported community court rendered speedier case processing).

¹²⁰ *See id.* (noting that this increase is most likely due to the compliance monitoring appearances).

¹²¹ *Id.*

The average number of days from court filing to disposition was 78.9 for the Hennepin community court defendants, compared to 80 and 124 for the two comparison groups used in that study. However, from arraignment to disposition, the community court needed 6.4 appearances compared to only 3.2 and 4.2 for the comparison defendants.

Id.

¹²² *Id.* (“In the first three years that the Midtown Court was open, the average arrest-to-arraignment time was 18.9 hours compared to 29.2 hours at the downtown Manhattan court.”).

¹²³ Kraistein, *supra* note 95, at 3 (explaining the decline in community crime was confirmed through both ethnographic observations and individual interviews).

¹²⁴ *Id.* Some of the prostitutes interviewed:

[C]omplained that alternative sentences at Midtown made it more difficult for them to “work”; furthermore, many women mentioned that they would contin-

iii. Cost/Benefit Analysis of Community Courts

Community courts have helped reduce crime in local neighborhoods, improve compliance with alternative sanctions and increase community confidence in the justice system.¹²⁵ The nation's first community court, New York Midtown Community Court, "has been credited with playing a pivotal role in the turnaround of Times Square, a neighborhood once plagued with drug dealing, prostitution, and rampant quality-of-life crime."¹²⁶ Benefits to neighborhood residents have ranged from tangible benefits, such as less graffiti and cleaner parks, to intangible benefits, such as an increased sense of safety and improved community relations.¹²⁷

One study showed that significant monetary benefits to the community resulted from the community court.¹²⁸ For example, approximately \$100,000 was saved due to decreased pre-arraignment detention.¹²⁹ By keeping police officers and defendants in the neighborhood instead of transporting them to the downtown courthouse, one community court cut the time between arrests and arraignment by forty-five percent.¹³⁰ In addition to money saved in the processing phase of a case, it also allows for increased police presence on the streets. Further monetary benefits have included "\$500,000 in reduced costs due to reduced use of jail, \$570,000 in future reduced costs due to reduced prostitution arrests, and \$150,000 in benefits derived from

ue to engage in prostitution but, would move out of the Midtown catchment area. (In response the Midtown Community Court made several efforts to combat the potential "displacement effect." Most notably, the Court now handles all prostitution arrests in Manhattan.)

Id. at 4.

¹²⁵ Berman and Knipps, *supra* note 15, at 9; see Judith S. Kaye, *Refinement or Reinvention: The State of Reform in New York*, 69 ALB. L. REV. 831, 837 (2006) (citing the principles driving problem-solving courts and the various secondary effects that flow from their success) [hereinafter *Refinement or Reinvention*].

¹²⁶ Decade of Change, *supra* note 1, at 7.

¹²⁷ See Berman & Gulick, *supra* note 103, at 1037 (describing the "concrete" as well as "intangible" benefits); see also *Refinement or Reinvention*, *supra* note 125, at 837-38 (regarding problem-solving courts as a means of effecting various forms of societal change by responding to the "cycle" of crime).

¹²⁸ See Kraistein, *supra* note 95, at 3 (highlighting the monetary benefits uncovered by cost-benefit analysis conducted by the Midtown Community Court).

¹²⁹ *Id.*

¹³⁰ *Crossroads*, *supra* note 2, at 32 (citing a statistic circa 1994).

the community service of defendants.”¹³¹ The total benefit was estimated to be approximately \$1.3 million annually.¹³²

Something interesting to note is that the adult drug court study, discussed above in section I (A) ii, found in both drug court participants and comparison defendants alike, that those with prior misdemeanor convictions and of younger age were generally more likely than others to recidivate across all courts and analyses.¹³³ This illustrates the importance of intervening early, sanctioning smaller crimes in a way that changes the behavior of the actor, and supporting community programs that specifically target the youth of the community.

C. Mental Health Courts in New York

i. An Overview of the Program

Due to the closings of so many mental hospitals in the 1980s and the subsequent release of an extraordinary number of patients into the general population, thousands of mentally ill offenders bring new burdens for the courts.¹³⁴ A recent study disclosed that an average of 16 percent of the national prison and jail population has some form of mental illness.¹³⁵ In other words, approximately 250,000 inmates nationwide are mentally ill.¹³⁶ “Of the inmates who report mental illness, only 17 percent of

¹³¹ Kraistein, *supra* note 95, at 3; see A Brief Primer, *supra* note 16, at 10 (stating that offenders provide “more than \$175,000 worth of labor to the local community each year”).

¹³² Kraistein, *supra* note 95, at 3.

¹³³ Rempel et al., *supra* note 42, at xi (remarking that those with prior misdemeanor convictions and at younger ages were among the predictors of recidivism).

¹³⁴ See Lippman, *supra* note 4, at 826 (commenting on the “well-documented closings of so many mental health hospitals”); see also John Goldkamp & Cheryl Irons-Guynn, U.S. Dep’t of Justice, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernardino and Anchorage 2–3* (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182504.pdf> (observing that the deinstitutionalization movement in the 1960s and 1970s led to a huge strain on the courts and criminal justice system because of the large influx of mentally ill defendants that followed).

¹³⁵ Denckla & Berman, *supra* note 40, at 3; see also Press Release, Bureau of Justice Statistics, *More Than a Quarter Million Prison and Jail Inmates are Identified as Mentally Ill*, 1 (July 11, 1999), available at <http://www.ujp.usdoj.gov/bjs/pub/press/mhtip.pr> [hereinafter Press Release] (“16 percent of those in state prisons or local jails or on probation said they either had a mental condition or had stayed overnight in a mental hospital.”).

¹³⁶ Denckla & Berman, *supra* note 40, at 3; see Press Release, *supra* note 135, at 1 (estimating that “283,000 mentally ill offenders were held in the nation’s state and local jails at midyear 1998”).

state prisoners and 11 percent of jail inmates receive treatment for mental illness while incarcerated.¹³⁷ One important factor to note is that studies of the mentally ill in jails and prisons do not consider defendants with mental illness whose cases were dismissed or who received an alternative sentence.¹³⁸ This makes it extremely difficult to obtain an exact number of people with mental illness in contact with the courts each day.¹³⁹ A study in Brooklyn though, showed preliminary results of as many as 30 percent of all arraigned defendants having a serious mental illness.¹⁴⁰

While offenders are incarcerated, mental illness often worsens.¹⁴¹ The result is that offenders often leave jail or prison either no better, or even worse than when they were first incarcerated.¹⁴² Jails and prisons are not typically equipped to handle

¹³⁷ Denckla & Berman, *supra* note 40, at 3.

¹³⁸ *Id.* at 6; see Goldkamp & Irons-Guynn, *supra* note 134, at 2 (2000). In their article, Goldkamp and Irons-Guynn stated that:

When the massive volumes of arrests, criminal cases processed, police contacts with citizens, persons supervised by pretrial services and probation and paroles services are also taken into account, the numbers of mentally ill persons dealt with and/or supervised by the criminal justice system on a routine basis in the United States is extraordinarily large.

Id.

¹³⁹ Denckla & Berman, *supra* note 40, at 6 (stating that surveys relying on self-reporting data, as well as the prevalence of dismissed cases involving mentally ill defendants, are "difficult to get an accurate read on"); cf. Joyce Kosak, Comment, *Mental Health Treatment and Mistreatment in Prisons*, 32 WM. MITCHELL L. REV. 389, 397 (2005) (commenting that statistics based on self-reporting studies are inaccurate).

¹⁴⁰ Denckla & Berman, *supra* note 40, at 6 (concluding that thirty-one percent of sample endorsed lifetime psychiatric diagnosis (citing Nahama Broner, Stacy S. Lamon, Damon W. Mayrl & Martin G. Karopkin, *Arrested Adults Awaiting Arraignment: Mental Health, Substance Abuse, and Criminal Justice Characteristics and Needs*, 30 FORDHAM. URB. L. REV. 663 (2003))); see Martin G. Karopkin, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 FORDHAM URB. L.J. 1790, 1803 (2002) (finding more than twenty percent of arraigned individuals in Kings County are "seriously mentally ill").

¹⁴¹ Denckla & Berman, *supra* note 40, at 4; see Stacey M. Farac, *Slip Slidin' Away? Will Our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIAC L. REV. 811, 823 (2004) (noting prison and jail environments often exacerbate the condition of mentally ill inmates because they may not fully understand the implications of their incarceration); see also T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 285 (1997) (stating that "[t]he lack of adequate mental health resources exacerbates existing serious mental conditions for inmates").

¹⁴² Denckla & Berman, *supra* note 40, at 3-4; see Andrea M. Odegaard, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 236 (2007) (describing how inmates often leave prison with a deteriorating mental condition); cf. Bonnie J. Sultan, *The Insanity of Incarceration and the Maddening Reentry Process: A Call for Change and Justice for Males with Mental Illness in United States Prisons*, 13 GEO. J. ON POVERTY L. & POL'Y 357, 372 (2006) (stating violence in pris-

these problems, but even when treatment programs are available, the benefits are limited because of long waitlists, lack of training, and a lack of incentive to participate in the programs.¹⁴³ Those fortunate enough to receive treatment still face insurmountable obstacles, since there is almost no discharge planning and aftercare service.¹⁴⁴ In addition, “[m]any community mental health centers are unprepared or unwilling to treat people who have criminal records.”¹⁴⁵

Prior to the creation of mental health courts, criminal courts used a handful of ineffective methods in dealing with the mentally ill.¹⁴⁶ Pleas of “not guilty by reason of insanity,” “guilty but mentally ill,” and rulings that a defendant is not competent to stand trial were the three most common ways to handle offenders with mental illness.¹⁴⁷ One of the many problems with these methods is that they are used so infrequently.¹⁴⁸ An eight-state

on culture leaves mentally ill “worse-equipped to become healthy members of the outside community than when they entered”).

¹⁴³ Denckla & Berman, *supra* note 40, at 3; see James R. P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 131 (1994) (discussing how lack of motivation among prison inmates to participate in treatment programs is one of the primary impediments to prison treatment).

¹⁴⁴ See Denckla & Berman, *supra* note 40, at 3 (“The inadequacy of treatment for mental illness and substance abuse in jails and prisons is exacerbated by the lack of adequate discharge planning and aftercare services.”); see also James R. P. Ogloff et al., *supra* note 143, at 132 (stating that many prison treatment programs terminate once inmate is released and transition back to the community is often difficult, as evidenced by high recidivism rates); see also T. Howard Stone, *supra* note 142, at 286 (explaining how lack of transitional planning and establishing of community linkages almost ensure inmates will “decompensate after release, reoffend, and subsequently be returned to the criminal justice setting”).

¹⁴⁵ Denckla & Berman, *supra* note 40, at 4.

¹⁴⁶ See Denckla & Berman, *supra* note 40, at 6 (describing problems with pleas of “not guilty by reason of insanity” and “guilty but mentally ill”); see also Ronda Cress, J. Neil Grindstaff & S. Elizabeth Malloy, *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion*, 25 ST. LOUIS U. PUB. L. REV. 307, 340 (2006) (positing that “punishment is often inappropriate and ineffective for the root causes of mentally ill defendants’ transgressions”).

¹⁴⁷ Denckla & Berman, *supra* note 40, at 6. See generally Julie E. Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1480–83, 1490–91 (2006) (describing rationales behind mental incompetence, “not guilty by reason of insanity,” and “guilty but mentally ill”).

¹⁴⁸ See Marnie E. Rice & Grant T. Harris, *The Treatment of Mentally Disordered Offenders*, 3 PSYCHOL. PUB. POLY & L. 126, 127 (1997) (highlighting studies that have concluded that insanity defense pleas are used very infrequently); see also Denckla & Berman, *supra* note 40, at 6 (stating that insanity pleas “are used very infrequently.”).

study concluded that the insanity defense was used in less than 1 percent of all cases, and it was only successful 26 percent of the time it was actually used.¹⁴⁹ This is in spite of the fact that 90 percent of those who used the defense had been previously diagnosed with a form of mental illness.¹⁵⁰ Judges typically lack the tools necessary to perform meaningful assessments of the offenders, or lack knowledge of the treatment options that are currently available.¹⁵¹ “Given these realities – and given concerns for public safety – judges find that in many cases the safest choice is to sentence mentally ill offenders to jail or prison.”¹⁵² In civil cases, judges can order involuntary treatment for those with a severe mental illness who are considered to be a danger to themselves or others.¹⁵³ But there are small numbers of inpatient beds available and patients are permitted to obtain their own release after a short period of time, so the impact of civil commitment is sharply limited.¹⁵⁴

Mental health courts in New York were created to handle criminal cases involving defendants with mental illness.¹⁵⁵ The defendants eligible for the mental health courts are those “whose

¹⁴⁹ Rice & Harris, *supra* note 149, at 127 (citing Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY L. 331, 331–38 (1991)) (describing Callahan’s eight-state study); Denckla & Berman, *supra* note 40, at 6 (outlining statistics from Callahan’s eight-state study).

¹⁵⁰ Denckla & Berman, *supra* note 40, at 6 (highlighting Callahan’s eight-state study); see Cynthia G. Hawkins-León, “Literature as Law”: *The History of the Insanity Plea and a Fictional Application within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 409 (1999) (noting statistics from Callahan’s eight-state study (citing Callahan et al., *supra* note 150, at 335)).

¹⁵¹ Denckla & Berman, *supra* note 40, at 1 (describing those judicial defects in evaluating mentally ill offenders); see Grachek, *supra* note 148, at 1479 (quoting that “the judicial system must be improved to deal more effectively with *all* mentally ill offenders”).

¹⁵² Denckla & Berman, *supra* note 40, at 1.

¹⁵³ *Id.* at 6; see Rachel A. Scherer, *Toward a Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment*, 4 IND. HEALTH L. REV. 361, 375 (2007) (describing “why involuntary treatment is necessary to treat severe mental illness”).

¹⁵⁴ Denckla & Berman, *supra* note 40, at 6; see David C. Stone, *Hollywood on the Screen and on the Streets: The Cuckoo’s Nest of LPS*, 31 LOY. L.A. L. REV. 983, 984 (1998) (“Of these 6000 patients each year, only a very select few are admitted to our thirty-six psychiatric inpatient beds. Once admitted, their average length of stay is 9.1 days. Some patients are there voluntarily, but most are there on involuntary fourteen-day commitments.”).

¹⁵⁵ Mental Health Courts, Overview, *supra* note 28 (outlining the purposes of the Mental Health Court); Bronx Mental Health Court Program Overview, http://consensusproject.org/programs/one?program_id=410 (last visited Mar. 12, 2008) (surveying the purposes of the Bronx Mental Health Court).

mental illness is related to their current criminal justice involvement and whose participation in the court will not create an increased risk to public safety.”¹⁵⁶ It is dependent upon the severity and type of mental illness, and the specific nature of the offense.¹⁵⁷ The essential principals guiding the management of each case are to (1) facilitate access to appropriate services, (2) provide rigorous judicial supervision, and (3) encourage collaboration “between the court, community stakeholders, local mental health departments, mental health service providers and social service providers.”¹⁵⁸ The goals of these courts are to improve the well-being of those with a mental illness, enhance public safety in local communities and improve court operations when dealing with the mentally ill.¹⁵⁹ These aims are met by providing offenders with mental illness the “support and structure they need in order to avoid further criminal behavior.”¹⁶⁰

Public safety can be improved by linking offenders to community-based services that will help to reduce recidivism rates.¹⁶¹

¹⁵⁶ New York State Unified Court System, Mission and Goals of Mental Health Courts, http://www.nycourts.gov/courts/problem_solving/mh/mission_goals.shtml (last visited July 23, 2008);

¹⁵⁷ See New York State Unified Court System, Key Principles of Mental Health Courts, http://www.nycourts.gov/courts/problem_solving/mh/key_principles.shtml (last visited July 23, 2008). In reference to referral, screening and assessment, states:

Defendants with mental illness cannot be identified on the basis of their criminal charges, and their symptoms and/or psychiatric history may not be readily apparent to lawyers and judges. In order to identify potential Mental Health Court participants, Mental Health Courts should ascertain all possible referral sources and develop tools and procedures for identifying, referring, and screening such individuals. Mental Health Courts should also have resources available for thorough psychosocial and/or psychiatric assessments of potential participants so that the court can determine whether an individual is eligible for participation and understand what community-based services will be required to meet the individual’s treatment goals and the community’s public safety goals.

Id.

¹⁵⁸ Mental Health Courts, Overview, *supra* note 28.

¹⁵⁹ See Mission and Goals of Mental Health Courts, *supra* note 156 (providing overview of Mental Health Court’s mission); see also Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illness: The Role of Mental Health Courts in System Reform*, 7 UDC L. REV. 143, 149 (2003) (stating that Mental Health Courts can accommodate the mentally ill while at the same time protecting the public).

¹⁶⁰ Mental Health Courts, Overview, *supra* note 28.

¹⁶¹ See Mission and Goals of Mental Health Courts, *supra* note 156 (“Linking these offenders to community-based services is intended to reduce recidivism.”); see also Bernstein & Seltzer, *supra* note 159, at 144 (positing that Mental Health Courts “strive to reduce the incarceration and recidivism of people with mental illnesses by linking them to the mental health services and supports that might have prevented their arrest in the first place”).

This will hopefully end the cycling of the same mentally ill offenders through the criminal justice system.¹⁶² Community-based treatment can also be used as an alternative to incarceration in an attempt to reduce or eliminate jail time for mentally ill offenders.¹⁶³

Mental health courts provide judges with the necessary tools to make more informed decisions about cases that involve mentally ill offenders by equipping courts with the resources required to perform meaningful assessments, identify suitable treatment options, and make connections to the many facets of the mental health system.¹⁶⁴ Improving the quality of life for mentally ill offenders is accomplished by changing society's response to behaviors associated with, or caused by, mental illness.¹⁶⁵ Instead of criminalizing the mentally ill, mental health courts are helping to connect these offenders to community-based treatment and support services that encourage recovery.¹⁶⁶ "Mental Health

¹⁶² See Mission and Goals of Mental Health Courts, *supra* note 156 (stating the court's intention to reduce recidivism); see also Bernstein & Seltzer, *supra* note 159, at 144 (providing that by linking people with mental illnesses to mental health services, the hope is that recidivism rates will decrease).

¹⁶³ See Pamela M. Casey & David R. Rottman, Nat'l Ctr. for State Cts., Problem-Solving Courts: Models and Trends 8 (2003), http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf (noting that although problem solving courts vary between states, most share a common goal of reducing inappropriate jail time for mentally ill offenders); see also Mission and Goals of Mental Health Courts, *supra* note 156 (explaining that problem solving courts seek to reduce the frequency and duration of incarceration where community based treatment is one proper alternative); see also Bernstein & Seltzer, *supra* note 159, at 148 (stating that focused community-based services and supports can be used to "[b]reak[] the cycle of repeated contact with the criminal or juvenile justice systems").

¹⁶⁴ See Mission and Goals of Mental Health Courts, *supra* note 156 (providing that judges and other courts have the necessary tools to make decisions that involve mentally ill people); see also Bureau of Justice Assistance, U.S. Dep't of Justice, *Mental Health Courts Program*, <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html> (last visited Mar. 13, 2008) (discussing use of specialized training for criminal justice personnel in mental health courts that is designed to ensure understanding of unique needs of mentally ill people).

¹⁶⁵ See Mission and Goals of Mental Health Courts, *supra* note 156 (explaining that the quality of life of mentally ill people would improve with community-based treatments, as opposed to society's current tendency to incarcerate mentally ill people due to behaviors associated with illness); see also William Kanapaux, *Guilty of Mental Illness*, PSYCHIATRIC TIMES, Jan. 1 2004, at 1, available at <http://www.psychiatrictimes.com/display/article/10168/47631> (noting that "the prison environment is dangerous and debilitating for prisoners who have mental illness").

¹⁶⁶ See Mission and Goals of Mental Health Courts, *supra* note 156 (explaining that by avoiding incarceration, and instead utilizing community services, problem solving courts promote recovery from mental illnesses). *But see* National Mental Health Association -

Courts must work closely with service providers to ensure that individuals obtain appropriate services throughout their participation in a Mental Health Court."¹⁶⁷

Some key principles of mental health courts are informed choice, voluntary participation, and individualized treatment plans.¹⁶⁸ A person's decision to participate in one of these courts must be both informed and completely voluntary.¹⁶⁹ Before the mental health court allows a defendant to enroll in the program, the court must first address the issue of the offender's competency.¹⁷⁰ It is the court's job to ensure that each participant fully understands the impact their involvement in the mental health court will have on their criminal case, their proposed treatment alternatives, and terms of their participation.¹⁷¹ Once the offender has enrolled, individualized treatment plans balance the goals of public safety with the individual's treatment goals.¹⁷² Each

Mental Health Courts, <http://www1.nmha.org/position/mentalhealthcourts.cfm> (last visited Mar. 12, 2008) (opining that relapses are common during recovery process for mental illnesses, and the litigant's time under mental health courts' jurisdiction should not be extended due to such relapses).

¹⁶⁷ Key Principles of Mental Health Courts, *supra* note 157.

¹⁶⁸ See *id.* (explaining that the majority of mental health courts have adopted common goals of informed choice, voluntary participation, and individualized treatment plans). See generally Council of St. Gov'ts Just. Ctr., U.S. Dep't of Justice, *Improving Responses to People with Mental Illnesses: The Essential Element of a Mental Health Court* 5-6 (2007), available at http://www.ojp.usdoj.gov/BJA/pdf/MHC_Essential_Elements.pdf (noting that some of the essential elements of mental health courts are informed choice, voluntary participation, and connecting participants to comprehensive and individualized treatment).

¹⁶⁹ See Key Principles of Mental Health Courts, *supra* note 157 (providing that participation in New York's Mental Health Courts must be voluntary); see also Counsel of St. Gov'ts Just. Ctr., *supra* note 168, at 5 (explaining that participation in mental health courts is voluntary).

¹⁷⁰ See Key Principles of Mental Health Courts, *supra* note 157 (explaining that actors in mental health courts follow standard procedures for ensuring that each litigant understands their participation and their case); see also Counsel of St. Gov'ts Just. Ctr., *supra* note 168 at 5 (noting that even when competency is not at issue in some cases, staffs at mental health courts ensure that litigants understand their cases).

¹⁷¹ See Key Principles of Mental Health Courts, *supra* note 157 (stating that people's decision to participate in Mental Health courts must be voluntary); see also Stacey M. Faraci, *Slip Slidin' Away? Will Our Nation's Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPIAC L. REV. 811, 828-29 (2004) ("[O]ne of the first orders of business is to determine whether the individual is competent. . . . '[E]ven among those deemed competent to stand trial, serious questions may be raised about the ability of persons to truly understand the choices being presented and the consequences of those choices.'").

¹⁷² Key Principles of Mental Health Courts, *supra* note 157 (explaining one cornerstone of Mental Health Courts is to balance individual treatment goals and public safety goals); see Counsel of St. Gov'ts Just. Ctr., *supra* note 168 at 6 (stating that when participants are identified and linked to a service provider, "the mental health court team should design a

plan implements court mandates and treatment-related objectives that need to be achieved by the participant in order to successfully complete and graduate from the program.¹⁷³

Another key principle of these courts is judicial monitoring and motivating compliance with the program.¹⁷⁴ Judicial monitoring and the coordination of judicial actions with clinical actions are used to motivate offender compliance with treatment.¹⁷⁵ In order to motivate compliance with court mandates, the courts will consider all appropriate information received from community-based service providers when delivering graduated rewards and sanctions.¹⁷⁶

ii. Summary of the Study: “The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes”¹⁷⁷

The Brooklyn Mental Health Court began operation in March 2002 in an attempt to reduce recidivism and to stop the conti-

treatment plan that takes into account the results of a complete mental health and substance abuse assessment, individual customer needs, and public safety concerns.”)

¹⁷³ Key Principles of Mental Health Courts, *supra* note 157 (positing that individual plans set forth what the participant must achieve to complete the program); *see* Faraci, *supra* note 171, at 826 (detailing MHC’s general team approach as “a structure of internal accountability to other components of the system . . . establish[ing] the defendant’s accountability to her treatment team” so “all involved feel personally invested in reaching a successful outcome”).

¹⁷⁴ Key Principles of Mental Health Courts, *supra* note 157 (holding that judicial monitoring to motivate compliance with treatment is one cornerstone of Mental Health Courts); *see, e.g.*, Faraci, *supra* note 171, at 832 (“[T]he judge wears a number of hats throughout the process, holding both formal and informal roles. . . . ‘the judge plays a . . . therapeutically oriented and directive role at the center of the treatment process.’ The judge is also responsible for assigning punishments and rewards for progress in treatment programs, and may prescribe sanctions . . .”).

¹⁷⁵ Key Principles of Mental Health Courts, *supra* note 157; *see* Faraci, *supra* note 171, at 833 (positing that additionally the MHC judge is looked at as a powerful motivating factor for the MHC defendant to comply with her treatment plan.).

¹⁷⁶ Key Principles of Mental Health Courts, *supra* note 157 (“Mental Health Courts can best meet both their individual treatment goals and their public safety goals when court staff, lawyers and community-based service providers regularly share appropriate information about participants.”); *see* Press Release, N.Y. State Unified Court Sys., New Court in Brooklyn Targets Mentally Ill Offenders (Oct. 1, 2002), *available at* http://www.nycourts.gov/press/pr2002_16.shtml [hereinafter New Court] (stating that defendants are accountable to comply with treatment and that “[g]raduated sanctions and rewards . . . with regular monitoring of treatment” keep “service providers accountable to the judge”).

¹⁷⁷ Kelly O’Keefe, Ctr. for Ct. Innovation, The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes (2006), *available at* http://www.courtinnovation.org/_uploads/documents/BMHCEvaluation.pdf.

nuous cycle of the mentally ill in and out of the criminal justice system.¹⁷⁸ The general goals of the court are to improve the court system's ability to recognize, evaluate and monitor offenders with mental illness, link them to the appropriate mental health treatment programs, and hold offenders accountable for their actions.¹⁷⁹ The court accomplishes this by addressing both the treatment needs of the individual and the public safety concerns of the local community.¹⁸⁰ The Center for Court Innovation performed this evaluation, which "assesses the planning process; describes key features of the court's model; and presents data on courtroom dynamics, team communication patterns, and participant characteristics, outcomes, and perceptions."¹⁸¹

In order to be eligible for the program, defendants must meet two sets of criteria: (1) mental health eligibility, and (2) criminal justice eligibility.¹⁸² To satisfy the mental health eligibility requirement, the offenders must have a serious and continuing mental illness for which there is an identified treatment, such as major depression, schizophrenia or bipolar disorder.¹⁸³ To satisfy the criminal justice eligibility requirement, initially the defendant had to have committed a non-violent felony or be a chronic misdemeanor offender, but the criteria was then expanded to include violent offenders on a case-by-case basis.¹⁸⁴ The reasoning behind this decision was that it became apparent that mental illness is often times the underlying factor leading to violent crimes.¹⁸⁵

One of the most important factors when determining eligibility is public safety. In order to manage the risks, a thorough psychiatric assessment is required prior to determining clinical eligibility, and an individual treatment plan is created for each participant.¹⁸⁶ To ensure proper risk management, judges and

¹⁷⁸ *Id.* at iii.

¹⁷⁹ *Id.* at iv.

¹⁸⁰ *Id.* at iii.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ O'Keefe, *supra* note 177 at iii.

¹⁸⁴ *Id.* at iii, v, 57 (noting that today more than one third of participants have entered with violent charge).

¹⁸⁵ *Id.* at 57.

¹⁸⁶ *Id.* at iv.

prosecutors are also given the ability to unilaterally reject any recommended participant.¹⁸⁷

One concern that has a greater presence in mental health courts than most other courts is that of coercion. While the use of coercion in other problem-solving courts is legal coercion (i.e. using a promise of a reduced sentence to get defendants to voluntarily enter into treatment programs), coercion in the mental health setting creates special problems. Many individuals involved with these courts expressed concerns about the role of coercion in regard to an offender's ability to understand the consequences of taking a plea, and about using coercion to administer medication.¹⁸⁸ In an attempt to combat this, the Brooklyn Mental Health Court created a series of documents that are publicly accessible, which were intended to clearly define participants' responsibilities and to make the court's policies, goals and procedures transparent.¹⁸⁹ Included in the documents were lists of possible sanctions or clinical responses, possible rewards, and a copy of a participant contract and formal participation guidelines.¹⁹⁰

Enrollment in the court's program is voluntary.¹⁹¹ The guidelines for program participation and the program contract clearly lay out the rights and responsibilities of both the offender and

¹⁸⁷ See *id.* (outlining public safety and risk management concerns and how the court addresses them); see also John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 936 (2000) (describing the new approach which involves "hands-on" judges and "a more connected relationship with treatment providers in a court-treatment process in which the judge controlled admission and termination").

¹⁸⁸ See O'Keefe, *supra* note 177, at iv (claiming that those most concerned about coercion are stakeholders, the defense bar and mental health advocates in particular); see also Teresa W. Carns et. al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 11-14 (2002) (discussing coercion generally in a therapeutic judicial context).

¹⁸⁹ O'Keefe, *supra* note 177, at iv (noting the steps the court has taken to promote transparency of process).

¹⁹⁰ See *id.* at 57-58 ("Enrollment in the court is voluntary, and the program participation guidelines and program contract clearly spell out the rights and responsibilities of the defendant and the judge. Medication compliance, on the other hand, is required; however, participants receive opportunities to discuss medication with team members and the judge.").

¹⁹¹ *Id.* at 57 (addressing concerns regarding the potentially coercive nature of the court); New Court, *supra* note 176 ("Participation in the program is voluntary for cases screened eligible for the court and is based on a plea of guilty from the defendant, who agrees to a course of treatment in lieu of incarceration.").

the judge.¹⁹² This is unlike medication compliance, which is mandatory.¹⁹³ Participants receive opportunities to discuss medication with the judge and a team member to ensure their understanding of the requirements.¹⁹⁴ In order to participate in the program, first-time felons must consent to a treatment plan lasting 12 to 18 months, felons with at least one previous felony conviction must consent to a treatment plan lasting 18 to 24 months, and misdemeanor offenders must consent to a treatment plan lasting 12 months.¹⁹⁵

a. Results

The evaluation examined 37 participants, comparing the first 12 months the offender participated in the program to the 12 months preceding entry into the program, or the 12 months preceding arrest if the participant was incarcerated at the time of intake.¹⁹⁶ The outcome measures used in the comparison were recidivism rates, homelessness, hospitalizations, substance abuse, psychosocial functioning, and the utilization of applicable services.¹⁹⁷ "Overall, the participants demonstrated considerable improvements in all of these areas, suggesting that additional research with a comparison group would find that the Brooklyn Mental Health Court positively impacts these outcomes."¹⁹⁸

The study indicated that there was a reduction in recidivism. During the 12 months prior to enrollment, 27 percent of participants had been arrested at least once.¹⁹⁹ Only six participants, constituting 16 percent, committed new offenses during the 12 months they were participating in the mental health court.²⁰⁰ Al-

¹⁹² O'Keefe, *supra* note 177, at 57, 61–68 (explaining all the program participation guidelines).

¹⁹³ *Id.* at 57, 63 ("Refusal or repeated failure to take medications may result in sanctions being imposed by the Mental Health court judge.")

¹⁹⁴ *See id.* at 57 (noting the interaction between participants, team members, and the judge); *see also id.* at 63 (positing that if patients have concerns about their medications, that they should tell their case manager, who will then discuss their concerns with the psychiatrist and see whether any acceptable alternatives are available).

¹⁹⁵ *Id.* at v (recording the preconditions to which participants in this program must agree to).

¹⁹⁶ *Id.* at vii (explaining the timeline over which the participants were measured).

¹⁹⁷ *Id.* (detailing the factors which compose the measurements of outcomes).

¹⁹⁸ O'Keefe, *supra* note 177, at 5.

¹⁹⁹ *Id.* (documenting arrest rates of participants 12 months prior to enrollment).

²⁰⁰ *Id.* (citing significantly lower arrest rates of participants while they were participating in these programs).

though there was only a small difference, there was also a reduction in homelessness. During the 12 months prior to enrollment, 16 percent of the participants were homeless, compared to the 11 percent of participants who were homeless during the first 12 months of enrollment in the program.²⁰¹ The average number of days a participant was homeless similarly declined, from 60 days to 35 days.²⁰² There was also a dramatic decrease in drug and alcohol use, and “[a] significantly higher percentage of participants were reportedly abstinent at follow-up than at intake.”²⁰³

As for psychiatric hospitalization, there was a decrease from 50 percent to 19 percent in the number of participants hospitalized when the 12 months preceding enrollment were compared to the first 12 months of the program.²⁰⁴ Participants also showed statistically significant improvement concerning problems with “cognition, depressed moods, living conditions, occupations and activities.”²⁰⁵

Another important finding has to do with participant perceptions. Research showed that the majority of participants perceived themselves as having a high level of control, choice, independent decision-making, and freedom while participating in the program; they did not feel coerced.²⁰⁶ Participants also indicated high levels of satisfaction with the experience and their perceived procedural justice.²⁰⁷ The program also had an unusually high one-year retention rate of 83 percent.²⁰⁸ This is an extremely encouraging result, since retention is the key to success when dealing with all problem-solving courts.

iii. Cost/Benefit Analysis of Mental Health Courts

Using traditional methods when dealing with the mentally ill is expensive in all respects as state and local governments incur

²⁰¹ *Id.* (comparing the percentage of participants who were homeless during the beginning of the program to twelve months prior to the program).

²⁰² *Id.* (reporting the decline in number of days participants were homeless during this program).

²⁰³ *Id.* at viii.

²⁰⁴ O’Keefe, *supra* note 177, at 52 (referring to data in Exhibit 25).

²⁰⁵ *Id.* at 53.

²⁰⁶ *Id.* at vi (analyzing results from coercion scale).

²⁰⁷ *Id.* (indicating high scores for satisfaction).

²⁰⁸ *Id.* at 58 (suggesting positive effect on participants).

considerable expenses when they incarcerate offenders.²⁰⁹ Once in custody, the condition of mentally ill individuals usually deteriorates without proper treatment.²¹⁰ They are later released back into the community with very little discharge planning; there is nothing in place to link them to housing or other necessary treatment or services.²¹¹ In addition, no one monitors the individuals to ensure that they are taking advantage of services that are available.²¹² After only a short period of time, these individuals are back in court repeating the same process.²¹³ No one benefits under that system: the mentally ill offenders do not receive the treatment and assistance they need, the justice system is wasting its resources on ineffective and inefficient procedures, and the community remains unsafe since no one has addressed the public safety problem in an effective manner.²¹⁴

The Brooklyn Mental Health Court has already accomplished its goal of advancing the court system's capabilities in identifying, assessing, and monitoring offenders with mental illness, and using the authority of the court system to connect offenders with the proper mental health treatment services.²¹⁵ Although the majority of the results of this study in regard to participants' improvements were not statistically significant, the evaluation

²⁰⁹ Denckla & Berman, *supra* note 40, at 1 (commenting on the costs of incarceration); see Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1, 23-24 (1995) ("Incarceration costs states an average of \$52.38 per day per inmate, which is over \$19,000 per year.").

²¹⁰ Denckla & Berman, *supra* note 40, at 1 (stating how prisons are not designed to be therapeutic environments); see Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 474 (1993) (explaining that prisons have negative impacts on inmates' mental health, ranging from "stress to psychiatric commitments to suicide").

²¹¹ Denckla & Berman *supra* note 40, at 1; see Stone, *supra* note 141, at 286 (noting that failures to make conduct transitional planning and to establish community linkages for those with severe mental disorders risks undermining mental health treatment).

²¹² Denckla & Berman, *supra* note 40, at 1; see Bonnie J. Sultan, *The Insanity of Incarceration and the Maddening Reentry Process: A Call for Change and Justice for Males with Mental Illness in the United States Prisons*, 13 GEO. J. ON POVERTY L. & POLY 357, 364 (stating that after incarceration, many persons with mental illness may not be able to obtain employment or housing, and may cease taking their medications due to their unmonitored disorders).

²¹³ Denckla & Berman, *supra* note 40, at 1; see Stone, *supra* note 141, at 286 (explaining that failure to engage in transitional planning for those with severe mental disorders ensures that inmates will re-offend and will be returned to the criminal justice system).

²¹⁴ Denckla & Berman, *supra* note 40, at 1; see Stone, *supra* note 141, at 286 (concluding that neither the inmates nor the criminal justice system benefit when those with severe mental disorders re-offend after release due to inadequate transitional planning).

²¹⁵ O'Keefe, *supra* note 177, at viii.

showed exceptionally promising results with improvements in almost all categories measured.²¹⁶ The court began operating in 2002, and the study only analyzed the first 12 months of each participant's program, but it has already shown very real and positive effects on its participants. The court still faces many challenges and certainly needs further analysis of a larger population of participants with a comparison group, but the preliminary findings are extremely hopeful.

D. Domestic Violence Courts in New York

i. An Overview of the Program

In the past, domestic violence was viewed as a private matter where the best course of action was to look the other way, leaving the parties to work their issues out on their own.²¹⁷ But this view changed with the dramatic increase in domestic violence cases.²¹⁸ In 1998, over 25,000 criminal cases alleging some form of domestic violence were filed in New York City alone.²¹⁹ Today it is recognized that domestic violence is a public, not private, issue that requires the criminal justice system to provide immediate and effective intervention.²²⁰ New York's domestic violence courts are

²¹⁶ *Id.*

Participants included in the outcome evaluation showed significant improvements in several outcome measures and a tendency toward improvement in nearly all other measures, even when the effect sizes were not statistically significant. The measures under examination went beyond traditional criminal justice indicators, including criminal recidivism as well as homelessness, substance use, hospitalizations, and psychosocial functioning. Future research may expand upon these results and provide more insight regarding whether how—and for whom—mental health courts work.

Id.

²¹⁷ Knipps & Berman, *supra* note 15, at 10 (“For many years, courts, prosecutors and the police viewed domestic violence as essentially a private matter—a family problem best left to the parties to work out on their own.”); see Erin L. Han, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159, 160–161 (stating that acts of domestic violence were traditionally “ignored by law enforcement, who viewed domestic violence as a ‘private’ matter, inappropriate for state intervention”).

²¹⁸ Knipps & Berman, *supra* note 15, at 10 (noting “the urgency of the problem is reflected in the rising volume of domestic violence cases in New York’s courts.”).

²¹⁹ *Id.*

²²⁰ *Id.* (“Today, more and more policymakers agree that domestic violence is a serious public issue—a social problem that requires an immediate and effective response from the criminal justice system.”); see Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 376 (1998) (noting that while there

committed to enhancing victim safety and holding offenders accountable for their actions.²²¹ For both victims' and defendants', these courts facilitate access to needed services, ensure intensive judicial monitoring and encourage increased coordination between the court, community and service providers.²²²

For obvious reasons, domestic violence cases are considered some of the most demanding and heart wrenching cases that judges must handle.²²³ "The chronic nature of abuse, the targeted victim, and the realities of children and family finances make . . . [it] an extremely complicated web to untangle."²²⁴ Increasing the difficulty for courts to intervene in a meaningful way is that many victims are reluctant to pursue legal remedies for various reasons, whether because of love, fear, or economic dependence on the offender.²²⁵

Domestic violence courts deal with "criminal offenses involving intimate partners."²²⁶ The courts adjudicate violations, misdemeanors and felony offenses which involve: (1) people who are involved, or have been involved, in an intimate relationship, including same-gender couples; (2) legally married couples; (3) those who were formerly married to one another; (4) those who have a child together, regardless of whether they have been mar-

has been improvement in the American Criminal justice system in its response to domestic violence, it "remains ineffectual in protecting women and children from death and abuse").

²²¹ Domestic Violence Courts, *supra* note 29 (stating that the New York Domestic Violence Courts promote victim safety and accountability by offenders); see New York State Division of Criminal Justice Services, New York State Domestic Violence Courts Program Fact Sheet, <http://criminaljustice.state.ny.us/ofpa/domviolcrtfactsheet.htm> (last visited Mar. 12, 2008) [hereinafter Fact Sheet] (stating that "victim safety and access to court case information . . ." and "[a]ccountability by offenders and those agencies responsible for defendant program . . ." are goals New York DV Courts promote).

²²² Domestic Violence Courts, *supra* note 29; Fact Sheet, *supra* note 221 (listing some of the goals NYS DV courts promote such as intensive judicial monitoring, access to services, and court partnerships with prosecutors, defense, probation, parole and other stakeholders).

²²³ See Lippman, *supra* note 4, at 827 ("Domestic violence cases are among the most difficult, heart-wrenching cases that any judge handles."); see also Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 128 (2004) (noting that state court dockets deal with families that bring "heart-wrenching issues like domestic violence, child abuse, and juvenile delinquency").

²²⁴ Lippman, *supra* note 4, at 827.

²²⁵ *People v. Moscat*, 777 N.Y.S.2d 875, 878 (Crim. Ct. 2004) (positing the belief that some domestic violence victims are unwilling to testify because of fear of defendant, economic dependency, emotional dependency or reluctance to break up family); Knipps & Berman, *supra* note 15, at 10.

²²⁶ Domestic Violence Courts, *supra* note 29.

ried or have lived together; and (5) family members, related by consanguinity or affinity.²²⁷

Unlike other categories of problem-solving courts, which differ in their methods and proceedings, domestic violence courts must engage in a structured planning and implementation process to ensure that each court retains a certain level of uniformity and operational consistency.²²⁸ Judges and non-judicial staff must participate in statewide training and education programs to ensure that they receive “continuing education in legal issues and procedures, social dynamics and available services.”²²⁹

The courts work with local law enforcement agencies to create procedures for identifying eligible cases at the earliest possible point.²³⁰ Domestic violence courts work with departments of probation and parole, along with several social services programs in order to ensure that there is constant communication and that reports of compliance or noncompliance with court-mandated programs are sent to the court immediately.²³¹ To confirm offender compliance and ensure accountability, whether the offender is in custody, on probation or released on bail, courts require defendants to return to court repeatedly while their cases are pending.²³²

²²⁷ See New York State Unified Court System, Key Principles of Domestic Violence Courts, http://www.nycourts.gov/courts/problem_solving/dv/key_principles.shtml (last visited July 23, 2008).

²²⁸ *Id.* (highlighting that Domestic Violence Courts strive to maintain “a level of uniformity and operational consistency” through a “structured six month planning and implementation process”); *but see Refinement or Reinvention*, *supra* note 126, at 838 (emphasizing that common to all problem-solving courts is the promotion of “uniformity across the court system by promulgating standard forms; utilizing standard technology to improve monitoring and accountability; when necessary, enacting uniform court rules; and appointing statewide administrators for coordination of these initiatives as their operations expand”).

²²⁹ Key Principles of Domestic Violence Courts, *supra* note 227.

²³⁰ *Id.* (stating that Domestic Violence Courts’ collaborative work with local law enforcement agencies is important for the identification of “eligible cases at the earliest stage of the proceeding”).

²³¹ *Id.* (suggesting that “ongoing communication” between the court and “departments of probation and parole” is important to ensure that the defendant is in compliance with court orders).

²³² Knipps & Berman, *supra* note 15, at 10.

Defendant accountability is another key element for promoting victim safety. Domestic violence courts rigorously monitor the behavior of defendants, requiring them to return to court regularly while their cases are pending—whether they are in custody, on probation or released on bail. The goal here is to send the message that the court takes domestic violence seriously and that any violation of a protective order will be dealt with swiftly and decisively.

One major difference between domestic violence courts and the other problem-solving courts is the need for intense focus on the victims. To assist victims, domestic violence courts give “immediate access to advocates who are able to provide safety planning, counseling and access to a range of social services.”²³³ The courts provide intensive services, including shelter, financial assistance, and job training.²³⁴ “By definition, victims and defendants have ongoing relationships.”²³⁵ This raises the risk of additional violence, which is why it is so important that courts provide these services and ensure offenders’ compliance with their programs.²³⁶ Another unique quality of domestic violence courts is that they must comply with the Fair Treatment Standards for Crime Victims.²³⁷ They do this by “providing safe and secure environments

Id. Eric Lane, Editor’s Note, *Special Series: Problem Solving Courts and Therapeutic Jurisprudence: Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 1020. “[D]efendants placed on probation must return to court once every two months for close monitoring in addition to visiting regularly with their probation officers.” *Id.*

²³³ Key Principles of Domestic Violence Courts, *supra* note 227.

²³⁴ Knipps & Berman, *supra* note 15, at 9 (“Complainants are linked to an on-site victim advocate, who helps them locate needed services such as shelter and counseling.”); Key Principles of Domestic Violence Courts, *supra* note 227 (noting that Domestic Violence Courts provide victim’s with “access to a range of social services”).

²³⁵ Knipps & Berman, *supra* note 15, at 9.

When the relationship meets the statutory definition of a family (cases where the victim and offender are married, formerly married, related by blood or marriage, or have a child in common) or the courts’ definition of an intimate relationship (cases where the victim and defendant are cohabitating or previously lived together, including “common-law” marriages and same-sex relationships) the courts classify the case as a DV case.

RICHARD R. PETERSON, NEW YORK CITY CRIMINAL JUSTICE AGENCY, COMBATING DOMESTIC VIOLENCE IN NEW YORK CITY: A STUDY OF DV CASES IN THE CRIMINAL COURTS 6 (2003), available at <http://www.nycja.org/research/reports/ressum43.pdf>. Victims and offenders in domestic violence crimes are usually in “daily contact and have emotional ties to each other.” *Id.* at 25.

²³⁶ See Knipps & Berman, *supra* note 15, at 9; see also PETERSON, *supra* note 235, at 2, 25–26 (stating further ideas for reducing offender recidivism, including “tailor[ing] different criminal justice interventions for different types of offenders”).

²³⁷ NY CLS Standards & Admin. Policies §129.1 (2008).

The purpose of these standards is to provide objective guidelines for the fair and uniform treatment of crime victims by the Unified Court System in order to encourage increased public cooperation and support of the criminal justice process, improve the overall effectiveness of the criminal justice system as it concerns crime victims and the public in general and help ensure that courts in the Unified Court System treat crime victims and witnesses with dignity and appropriate understanding.

Id. See Key Principles of Domestic Violence Courts, *supra* note 227 (noting that compliance provides “a safe and secure environment in which to adjudicate domestic violence cases and protect victims and witnesses”).

in which to adjudicate domestic violence cases and protect victims and witnesses.”²³⁸

ii. Summary of the Study: “Testing the Effectiveness of Batterer Programs and Judicial Monitoring: Results from a Randomized Trial at the Bronx Misdemeanor Domestic Violence Court”²³⁹

This study took place in the Bronx Misdemeanor Domestic Violence Court, consisting of offenders enrolled between July 23, 2002 and February 27, 2004.²⁴⁰ “All eligible offenders were arraigned on a domestic violence misdemeanor, convicted of a violation, and sentenced to a conditional discharge with a one-year protection order in favor of the victim.”²⁴¹

The offenders compared in the study consisted of two groups, those assigned to a batterer program and those who only received some form of judicial monitoring.²⁴² Each offender was randomly assigned to one of the following: “(1) a batterer program plus monthly judicial monitoring; (2) batterer program plus ‘graduated’ monitoring” (those who comply require less frequent court appearances, while those who do not comply receive more frequent court appearances), “(3) monthly monitoring only; and (4) graduated monitoring only.”²⁴³ The offenders who were assigned to batterer programs had to attend one of two 26-week programs, where classes met once a week, each class running 75 minutes.²⁴⁴

Because all four of the experimental conditions included judicial monitoring, it was impossible to determine if judicial monitoring had any benefit over no judicial monitoring at all.²⁴⁵ For

²³⁸ Key Principles of Domestic Violence Courts, *supra* note 227.

²³⁹ Melissa Labriola et al., Ctr. for Ct. Innovation, Testing the Effectiveness of Batterer Programs and Judicial Monitoring (2005), available at <http://www.courtinnovation.org/uploads/documents/battererprogramseffectiveness.pdf>.

²⁴⁰ *Id.* at v.

²⁴¹ *Id.*

²⁴² *Id.*, at v, vii.

²⁴³ *Id.*, at v (claiming that the trial was designed in such a way to determine if batter programs resulted in lower recidivism rates).

²⁴⁴ *Id.*, at vi (stating that during these sessions men were educated on societal norms and encouraged to take responsibility for their anger and emotions).

²⁴⁵ Labriola, *supra* note 239, at vii; see *Legislation Puts New York in the Vanguard in Combating Sex Trafficking*, EQUAL JUST. (NYS Judicial Committee on Women in the Courts), Sept. 2007, available at <http://www.courts.state.ny.us/ip/womeninthecourts/>

this reason the second part of the study compared the offenders participating in the domestic violence court to those offenders adjudicated in a traditional court system.²⁴⁶ Those who were from the comparison pool of offenders were “convicted of the same offenses during the same period of time but who, as a result of normal sentencing deliberations, were sentenced to a conditional discharge involving neither a batterer program nor monitoring.”²⁴⁷

The goal was to isolate the groups so that the researchers could determine which was more beneficial in reducing recidivism rates: judicial monitoring, batterer programs, judicial monitoring and batterer programs together or just traditional adjudication.²⁴⁸ In order to minimize the risk of bias, the researchers only compared those offenders who had the same background characteristics, such as “demographics, criminal history, current charges, and relationship to [the] victim.”²⁴⁹ In the end, the study focused on 387 participants from the judicial monitoring group and 219 participants in the non-monitored comparison group.²⁵⁰ The time period researched was for one year after sentencing.²⁵¹

a. Results

In light of the successes of the other problem-solving courts, the outcomes of this study were unexpected. The assignment to batterer programs did not reduce the probability of re-arrest.²⁵² A total of 29 percent of those who were assigned to a batterer program were re-arrested, 16 percent for domestic violence, while 26

newsletter_9-07.pdf (arguing that “in the year following a conviction, abusers assigned to batterer programs are arrested on new charges as frequently as those who are not ordered to attend programs”).

²⁴⁶ Labriola, *supra* note 239, at 13 (pointing out that under traditional court systems of offenders received neither batterer program nor any form of monitoring).

²⁴⁷ *Id.* at vii (concluding that although this scheme lacked methodological benefits of random assignment, it did help diminish risk of bias).

²⁴⁸ *Id.* at v (positing that findings of this trial can be deemed highly credible because random assignment methods were used).

²⁴⁹ *Id.* at vii (noting that when the final two samples were completed there was not one single significant difference in their baseline characteristics).

²⁵⁰ *Id.* (explaining that thirty-three of initial 420 offenders in judicial monitoring group were removed due to missing essential data required for matching).

²⁵¹ *Id.*

²⁵² Labriola, *supra* note 239, at vii.

percent of those who were not assigned to a batterer program were re-arrested, 12 percent for domestic violence.²⁵³

The judicial monitoring schedule had no impact on the likelihood of re-arrest.²⁵⁴ A total of 28 percent of those who were assigned to monthly monitoring were re-arrested, 13 percent for domestic violence, while 27 percent of those who were assigned to graduated monitoring were re-arrested, 14 percent for domestic violence.²⁵⁵ The impact of judicial monitoring on re-arrest, compared with the complete absence of monitoring, produced no reduction in recidivism.²⁵⁶ A total of 27 percent of those in the monitoring program were re-arrested, 13 percent for domestic violence, while 24 percent of those who were in the no-monitoring sample were re-arrested, 14 percent for domestic violence.²⁵⁷

iii. Cost/Benefit Analysis of Domestic Violence Courts

One of the possible reasons why domestic violence courts did not show any reduction in recidivism was the lack of a robust form of judicial supervision.²⁵⁸ Apparently, there were adequate positive incentives to graduate from the program, but “noncompliance did not consistently and immediately trigger sanctions, jail or other, designed to enforce the court’s conditions and deter future noncompliance.”²⁵⁹ One suggestion for future studies would be to include a more rigorous judicial supervision regimen, applying both positive and negative incentives to foster compliance.²⁶⁰ This would also provide for greater emphasis on accountability, where noncompliance would trigger imposition of consequences, rather than a greater focus on rehabilitation,

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at vii–viii.

²⁵⁸ See Labriola, *supra* note 239, at ix (describing how the judicial supervision was weak within domestic violence courts); see also Ron Chase, *A Case Study in Transition for Ex-Offenders: Sponsors, Inc.*, 23 S. ILL. U. L.J. 505, 507 (1999) (“[W]hile more supervision was not associated with reductions in recidivism, supervision coupled with counseling, employment assistance, restitution, and community service was associated with lower levels of arrest and technical violations.”).

²⁵⁹ Labriola et al., *supra* note 239, at ix.

²⁶⁰ *Id.*

which is evidently another possible problem with the current system.²⁶¹

An interesting finding from the study was that the predictors of recidivism that the researchers identified seemed to predict re-arrest for any offense, not domestic violence in particular.²⁶² This shows the need for further analysis and future studies to determine the true dynamics involved in domestic violence offenses.²⁶³ The lack of positive reductions in recidivism may be the result of a focus on the wrong social background variables, both in choosing comparison offenders and in determining the factors upon which the batterer programs should focus. It may also be the result of many other easily changeable and testable elements.

The conclusion of the study noted the regret of the researchers, because some of the most prevalent court responses to domestic violence crimes may be ineffective.²⁶⁴ But regret may be the wrong reaction to a result such as this. The purpose of problem solving is to experiment and constantly search for the most efficient and effective ways to change harmful behavior, protect the public, and resolve cases. It seems that the way to do this is through conducting studies, finding unbiased results and changing the current methods if they are not working. Considering the success of the other problem-solving courts, further attempts at finding successful domestic violence programs are surely warranted.

E. Sex Offense Courts in New York

i. An Overview of the Program

The goal of sex offense courts in New York is to improve public safety by preventing future victimization.²⁶⁵ The courts accom-

²⁶¹ *Id.* (describing stricter judicial supervision system with greater emphasis on accountability).

²⁶² *Id.* at viii.

²⁶³ *Id.* at ix (stating that "there is a need for replication of our monitoring results, preferably involving a test of a more rigorous judicial supervision regimen").

²⁶⁴ *Id.*

²⁶⁵ See New York State Unified Court System, Mission and Goals of Sex Offense Courts, http://www.nycourts.gov/courts/problem_solving/mh/home.shtml (last visited July 24, 2008) (explaining that one way the Sex Offense Courts promote justice is by enhancing community safety); see also *People v. Victor J.*, 720 N.Y.S.2d 304, 313 (Sup. Ct. 2000) ("[I]ntervention must have in mind the long-term goal of protecting the community by preventing further misconduct . . .").

plish this by continuously applying the following core principals to every case: (1) early intervention, (2) consistency, (3) post-sentencing monitoring, and (4) accountability.²⁶⁶ Early intervention is accomplished by judges and staff coordinating with the many organizations that come into contact with alleged sex offenders and victims, such as local law enforcement, the district attorney's office, defense attorneys, the department of probation, and victim services agencies.²⁶⁷ Consistency is achieved by coordinating with those agencies at the earliest possible stage to ensure a uniform approach to management of these cases and to develop and use the best practices possible.²⁶⁸

Post-sentence monitoring is two-fold, judicial monitoring and community supervision. In order to have successful judicial monitoring, immediate communication to the judge about the offender's compliance or noncompliance is necessary.²⁶⁹ There should be a swift response to "violations of conditions of probation as well as to violations of the Sex Offender Registration Act."²⁷⁰ Commu-

²⁶⁶ See Mission and Goals of Sex Offense Courts, *supra* note 265 (positing that the Sex Offense Court model follows "a set of key principles"; see also Donald J. Farole et. al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 57 (2005) (noting that problem-solving courts have many unique elements such as "problem-solving focus; team approach to decision making; integration of social services; judicial supervision of the treatment process; direct interaction between defendants and the judge; community outreach; and a proactive role for the judge inside and outside of the courtroom").

²⁶⁷ Mission and Goals of Sex Offense Courts, *supra* note 265; see Suzanne Cecala & Mary M. Walsh, N.Y. State Office for the Prevention of Domestic Violence, *New York State's Response to Domestic Violence: Systems and Services Making a Difference* 1, 8 (2006), http://www.opdv.state.ny.us/about_dv/nyresponse/nysdv.pdf (describing the overlap between sexual assault with domestic violence, NYS Office for the Prevention of Domestic Violence, and OPDV, and that the OPDV "addresses a wide array of disciplines through training and technical assistance, legislation and outreach, including: community coordination, police, legal system, courts, prosecution, legal services, community corrections, probation, batterer programs, health care, mental health substance abuse, child welfare, child protective services, social services and the work place.").

²⁶⁸ Mission and Goals of Sex Offense Courts, *supra* note 266; see Cecala & Walsh, *supra* note 267, at 50 ("Because of the significant connection between sexual assault and domestic violence, as well as a continual shortage of resources, many communities in New York State have chosen to combine local rape crisis and domestic violence services, creating dual domestic violence/sexual assault programs.").

²⁶⁹ Mission and Goals of Sex Offense Courts, *supra* note 265; Cecala & Walsh, *supra* note 267, at 33 (revealing the similarities of this intensive monitoring system of offenders that is conducted by Domestic Violence Courts to that promoted by Sex Offense Courts).

²⁷⁰ Mission and Goals of Sex Offense Courts, *supra* note 265; see Campbell Robertson, *As Sex-Offender Notices Rise, Some Say Even More Is Better*, N.Y. TIMES, Mar. 6, 2005, at § 14 LI (revealing that "local authorities on Long Island have been notifying communities about the presence of sex offenders, many of whom had just gotten out of prison").

nity supervision is accomplished by the courts, working with probation and parole agencies to identify and outline their roles as active participants in these programs.²⁷¹ Special conditions for sex offenders, as part of a sentence of probation, are considered critical for effective management of these offenders in the community.²⁷² The types of special conditions the courts are expected to utilize include polygraph testing and treatment programs that aid the offender in reducing risk-taking behaviors that can lead to re-offending.²⁷³ Accountability is promoted through judicial monitoring, community supervision, and by “[r]apid calendaring for sex offenders on probation, including those in need of a modification of conditions.”²⁷⁴

The first New York sex offense court began operating in 2005.²⁷⁵ New York’s model was based upon the knowledge and effective practices of the Center for Sex Offender Management, which is a national center for managing sex offenders.²⁷⁶ Sex offense courts track their cases and collect data by using a database and a case management tool developed by the Unified Court System.²⁷⁷ Those procedures were implemented to allow for evaluation of the courts,²⁷⁸ but since sex offense courts are so new to New York, there has not yet been a completed study of their progress. The Center for Court Innovation is currently conducting an evaluation of one of the pilot sex offender courts, and the results should be published in the near future.²⁷⁹

²⁷¹ Mission and Goals of Sex Offense Courts, *supra* note 265; see Decade of Change, *supra* note 1, at 19 (describing Harlem Parole Reentry Court which operates in collaboration with the New York State Division of Criminal Justice Services and Division of Parole to assist parolees in their re-entrance into communities).

²⁷² Mission and Goals of Sex Offense Courts, *supra* note 265.

²⁷³ *Id.*; see, e.g., Abby Goodnough & Monica Davey, *For Sex Offenders, a Dispute Over Therapy’s Benefits*, N.Y. TIMES, Mar. 6, 2007, available at <http://www.nytimes.com/2007/03/06/us/06civil.html#> (describing different phases of treatment, including relapse prevention, which is intended to curb sex offending itself, and cognitive-behavior techniques, which is meant “to change broader destructive patterns of thinking and reacting”).

²⁷⁴ Mission and Goals of Sex Offense Courts, *supra* note 265; see Cecala & Walsh, *supra* note 267, at 16 (revealing the need to protect victims of sex offenses and strengthen consequences for sex offenders).

²⁷⁵ Sex Offense Courts, *supra* note 31.

²⁷⁶ Mission and Goals of Sex Offense Courts, *supra* note 265.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See Ctr. for Ct. Innovation, Research Project Assistance, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&PageID=589> (last visited Mar. 13, 2008) (noting “Evaluation of a Pilot Sex Offender Court” as one of the Center’s current projects).

II. ARE PROBLEM-SOLVING COURTS WORTH CONTINUING?

Problem-solving courts strive to attain tangible results for all parties affected: offenders, victims and society.²⁸⁰ The successes of problem-solving courts have given a basis for tremendous hope and such courts are absolutely worth continuing. These courts are improving upon current methods of adjudication and are doing so for far less money than traditional courts. It is a win-win situation for litigants, attorneys and taxpayers alike.

New York is said to be a place of constant change, and the key to survival is said to be adaptation.²⁸¹ "People, institutions, neighborhoods, and buildings find new outlooks and new uses – or vanish."²⁸² Although problem-solving courts are still experimenting, initial studies have shown that they are making a real difference.²⁸³

The research indicates that there are "improved case outcomes, including reductions in crime, increased sobriety for addicts, safer neighborhoods, fewer probation violations, and enhanced public confidence in justice."²⁸⁴ On a more personal level, domestic violence victims are being linked to safe shelters and much needed services; community residents of once high-crime neighborhoods no longer have to keep away from their local parks at night; formerly-addicted mothers are being reunited with their children and are having drug-free babies; mentally-ill defendants are finally receiving meaningful treatment; and for the first time there are adequate plans and resources for former offenders to reenter the community with the tools necessary to succeed.²⁸⁵

²⁸⁰ A Brief Primer, *supra* note 16, at 8; see Mission and Goals of Sex Offense Courts, *supra* note 265 (stating that the "comprehensive approach" of problem solving courts "increas[es] sex offender accountability, enhanc[es] community safety while protecting the rights of all defendants").

²⁸¹ Decade of Change, *supra* note 1, at 15.

²⁸² *Id.*

²⁸³ *Quiet Revolution*, *supra* note 17, at 213 (noting that there is "a growing body of evidence" that these problem-solving courts are "making a real difference" and reporting that "a recent study of a community court in midtown Manhattan revealed that the court had helped reduce neighborhood street prostitution by as much as 50 percent"); see Leslie Eaton & Leslie Kaufman, *Judges Turn Therapist in Problem-Solving Court*, N.Y. TIMES, Apr. 26, 2005, at A1 (highlighting success of New York drug courts in preventing recidivism).

²⁸⁴ *What is a Traditional Judge*, *supra* note 2, at 79.

²⁸⁵ A Brief Primer, *supra* note 16, at 9; see *Closing Revolving Door*, COLUMBUS DISPATCH, June 12, 2003, at 14A.

There are over 2,500 problem-solving courts throughout the nation.²⁸⁶ The Conference of Chief Justices, the Conference of State Court Administrators, and the American Bar Association all promote problem-solving justice.²⁸⁷ These courts have been proven to be “both effective and fair, and they are using the skills of lawyers and judges in ways that are meaningful and positive for our society.”²⁸⁸ By solving the problems seen on a daily basis in the courthouse, problem-solving courts are helping to prevent the problems faced by society.²⁸⁹ With each passing year, “the evidence grows stronger that these nontraditional legal and judicial approaches are producing better outcomes and helping to break the cycle of hopelessness that ravages countless lives, families and communities.”²⁹⁰

²⁸⁶ Decade of Change, *supra* note 1, at 16.

²⁸⁷ *Id.*; see THOMAS D. BARTON & JAMES M. COOPER, PREVENTIVE LAW AND CREATIVE PROBLEM SOLVING: MULTI-DIMENSIONAL LAWYERING 16 (2000), http://www.preventivelawyer.org/content/pdfs/Multi_Dimensional_Lawyer.pdf (stating that U.S. Conference of Chief Justices and Conference of State Court Administrators agreed to resolution proposing integration methods employed in problem-solving courts).

²⁸⁸ Lippman, *supra* note 4, at 831.

²⁸⁹ *Id.*; see Fagan & Malkin, *supra* note 107, at 907 (indicating that existence of problem-solving court sends signal to community that the law is working to prevent illegal and antisocial behavior).

²⁹⁰ Lippman, *supra* note 4, at 831.

