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JURISTOCRACY IN THE TRENCHES: PROBLEM-SOLVING JUDGES AND THERAPEUTIC JURISPRUDENCE IN DRUG TREATMENT COURTS AND UNIFIED FAMILY COURTS

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Many who write about the shifting role of judges in the United States focus their attention on the Supreme Court. In her 1994 book, *A Nation Under Lawyers*, Mary Ann Glendon argues that the “classical” Justices of an earlier generation, including Holmes, Cardozo, and Frankfurter, have been replaced on the contemporary Supreme Court by “romantic” Justices, who conceive of their role and their authority in ways that fundamentally are at odds with longstanding tradition.¹ The “classical ideal,” suggests Glendon, was “associated with modesty, impartiality, restraint, and interpretive skill.”² The “romantic” judge, by contrast, is “bold, creative, compassionate, result-oriented, and liberated from legal technicalities.”³

Glendon is not just concerned about the changing nature of the Supreme Court, she also is worried that unreconstructed romanticism on the part of the Justices and other high visibility judicial actors encourages other more ordinary judges within the legal system to abandon their traditional role in favor of the thrills of unbridled judicial activism.⁴ Indeed, she reports that the “romantic ideal” has already “fired the imaginations of judges in the capillaries of the legal system”⁵ so that these trial level state court judges are more interested in crafting solutions that register as fair according to their own personal moral compasses than in undertaking the neutral application of authoritative legal principles to facts fairly found. Notwithstanding her

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1. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 4-5 (1994).

2. *Id.* at 152.

3. *Id.*

4. As Glendon puts it:

Like deficit spending or toxic-waste dumping, the regime effects of romantic judging are not easy to discern until the harm has reached crisis proportions. But just as impartial judges are beacons, leading public servants of all sorts in the direction of reasoned adherence to principle, romantic judges are pied pipers enticing bureaucrats everywhere to new heights of arrogance and abuse of power.

5. *Id.* at 168-69 (footnote omitted).

description of the contemporary Supreme Court as activist, Glendon holds out hope that the Justices' example may come to be regarded as "a poor guide to how judges throughout the system should comport themselves as a general matter" because "[t]he unique political role of the nation's highest court" may be understood to require a different set of qualities than those demanded of lower courts, which Glendon describes as the "heroism of sticking to one's last, of demonstrating impartiality, interpretive skill, and responsibility toward authoritative sources in the regular administration of justice."⁶

There are plenty of interesting questions to pursue regarding the claims that Glendon and others have made about the shifting nature of the Supreme Court. It is fair to ask whether the current Justices really are more activist than were their predecessors and whether Justices Holmes and Frankfurter were as restrained as Glendon suggests. If a shift has indeed taken place, we should try to identify those factors within our broader politics that have contributed to it and catalogue the consequences for participatory democracy of an expansion of, and change in the nature of, judicial power. In addition, it is worth examining Glendon's suggestion that the judicial romanticism of Justices William Douglas, William Brennan, and Anthony Kennedy has spread downward and outward to ordinary judges in ordinary courts throughout the United States and the related claim that this growing judicial activism among lower court judges has been caused, at least in part, by the behavior of the High Court.⁷ Moreover, if the consequences for democratic politics of judicial romanticism on the Supreme Court are worthy of study, then so too are the consequences for democratic politics of judicial romanticism among judges in the "capillaries of the legal system,"⁸ those who sit on trial-level courts throughout the land.

This Essay briefly examines developments in two related capillaries: drug treatment courts and unified family courts (UFCs). As Glendon suggests, the judges who serve on these "problem-solving" courts have largely repudiated the classical virtues of restraint, disinterest, and modesty, replacing these features of the traditional judicial role with bold, engaged, action-oriented norms.⁹ But the causes and consequences of this role-shift are complex; it is unlikely that the proliferation of these unconventional courts has very much to do with the pronouncements of hubristic Justices on the Supreme Court. In-

Id. at 161.

6. *Id.* at 169-70.

7. *Id.* at 161-62.

8. *Id.* at 161.

9. *Id.* at 152.

stead, it seems clear that each is the product of a unique process of interaction among political, social, and institutional forces. The drug court movement has been sparked in significant measure by political overreaching on the part of state legislatures in the formulation of criminal justice policy and by the need of individual judges to reclaim a sense of efficacy in the face of criminal sentencing provisions that increasingly have transformed judicial officers into mid-level bureaucrats embedded within the administrative state. Unified family courts, by contrast, reflect the joint efforts of state legislators, administrators, and court officials to cope with burgeoning caseloads and demands for services brought on by significant changes in family structure and in the legal doctrines applicable to divorce and parenting disputes. Thus, in both areas, changes in judicial behavior have less to do with role modeling within the judicial branch and more to do with political pressures and institutional relationships among legislatures, courts, and administrative agencies.

I. DRUG TREATMENT COURTS

Specialized drug courts or court calendars began appearing in the mid-1980s as a consequence of a dramatic increase in the number of drug-related cases that were flooding the criminal system.¹⁰ Originally, these drug courts were designed to expedite drug cases in order to reduce the crushing caseloads occasioned by the “war on drugs.” Beginning in Dade County, Florida in 1989, however, a new kind of court began to appear.¹¹ These drug treatment courts were different from the expedited drug calendars in that they were designed to integrate traditional criminal case processing features with community-based substance abuse treatment resources. While many variations on the basic model can be found, certain “key components” of the drug treatment court approach are regarded by advocates as essential.¹² These key features include: the referral of defendants to substance abuse treatment facilities in the community; the use of the threat of traditional criminal penalties as leverage to retain defendants in treatment; judicial monitoring of defendants’ progress in treatment through the use of regular urinalysis testing and periodic “status hearings” in open court; and the imposition of increasingly severe “gradu-

10. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1207-09 (1998).

11. Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517 (2003).

12. DRUG COURT STANDARDS COMM., NAT’L ASS’N OF DRUG COURT PROF’LS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997).

ated sanctions," in instances of noncompliance with the treatment regime, and graduated rewards for successes.¹³

Hundreds of drug treatment courts have been established throughout the United States. There is a National Association of Drug Court Professionals with a membership in the thousands; annual conferences are held, and professional publications abound.¹⁴ The response to the drug treatment court movement by the media and by politicians has been extraordinarily positive. As James Nolan, a keen observer of the movement, has put it: "Conservatives support [drug treatment courts] because of [their] tough intrusive nature and liberals because of [their] ostensibly more humane and compassionate approach toward offenders. In many important ways the style and scope of the drug court transcend conventional political categories."¹⁵

Perhaps no single characteristic of the drug treatment court movement has been as important as its frank pragmatism. The architects and supporters of these courts variously have claimed that they are an effective response to criminal justice system overload brought about by the war on drugs, a means of reducing the high expenditure of resources by other criminal justice agencies necessitated by the lengthy prison sentences that many drug offenders receive, a useful way to insure that the revolving door of addiction and criminality is interrupted through the use of effective therapeutic approaches to drug use disorders, and an attractive alternative to the "assembly-line justice" that has distorted the adversary system.¹⁶ Given these claims about efficacy, it should come as little surprise that drug treatment courts have served as the conceptual model for a number of more recent problem-solving courts, including domestic violence courts, gun courts, mental health courts, community courts, re-entry courts, and others that also stake their existence on a set of pragmatic assertions about "what works."¹⁷

13. STEVEN BELENKO, RESEARCH ON DRUG COURTS 6-7 (1998).

14. McCoy, *supra* note 11, at 1523.

15. James L. Nolan, Jr., *Therapeutic Adjudication*, SOCIETY, Jan./Feb. 2002, at 29, 29.

16. McCoy, *supra* note 11, at 1517-18.

17. PAMELA CASEY & WILLIAM E. HEWITT, COURT RESPONSES TO INDIVIDUALS IN NEED OF SERVICES: PROMISING COMPONENTS OF A SERVICE COORDINATION STRATEGY FOR COURTS 23, 26-29 (2001). The current popularity of drug treatment courts has combined with two other phenomena to spur the development of a second generation of therapeutic or problem-solving courts. One phenomenon is the spreading influence of "therapeutic jurisprudence," a theoretical perspective originally developed to critique existing legal regimes by demonstrating their anti-therapeutic effects. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003). For further discussion of therapeutic jurisprudence, see *infra* Part III.

At a rhetorical level, this thoroughgoing pragmatism contrasts with the claims of procedural regularity and retributive justice that generally predominate in our system of criminal blaming and criminal sentencing. On the process side, the criminal system generally is thought of in terms of formal adversarial disputing, notwithstanding its pervasive reliance on plea negotiations. Two key features of the traditional adversarial model are its use of neutral, detached decisionmakers and formal rules of procedure. Taken together, these two features reflect an understanding that the interests of an individual criminal defendant ordinarily are adverse to those of the state and that the structure of a criminal prosecution is inherently unstable. As Martin Shapiro long ago observed, the triadic configuration of a criminal prosecution (or any adversarial proceeding) is prone to collapse into "two against one" once the decisionmaker announces a winner and a loser.¹⁸ To prevent the delegitimizing consequences of such a collapse, our system ordinarily relies upon formality and neutrality to prevent even the appearance of an alliance between the judge and the prevailing party.¹⁹ In drug treatment courts, by contrast, the stabilizing influence of judicial neutrality and formal rules of procedure are diminished precisely because the interests of the defendant are now seen as consonant with those of the state. The notion that the judge is bound to adopt a "neutral position in the resolution of conflict" is replaced in these courts by a role conception in which "the judge is partisan, aiming to cure the offender of his addiction."²⁰ In effect, the

A second intersecting dynamic is the growing recognition by judges and others that traditional courts are ill equipped to deal with the broad array of social pathologies that flood through the courthouse doors. As Chief Judge Judith Kaye of the New York Court of Appeals has explained it:

We've witnessed the breakdown of the family and of other traditional safety nets. So what we're seeing in the courts is many, many more substance abuse cases. We have a huge number of domestic violence cases. We have many, many more quality-of-life crimes. And it's not just the subject of the cases that's different. We get a lot of repeat business. We're recycling the same people through the system.

Greg Berman, "What Is a Traditional Judge Anyway?": *Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000).

The result of this confluence of practice (the hundreds of operating drug treatment courts around the country and the growing recognition of underlying pathologies) and theory (the spread of therapeutic jurisprudence from a few academics to scores of influential judges and other policymakers) has been the creation of numerous other problem-solving courts. See *infra* Part IV.

18. Martin Shapiro, *The Logic of the Triad*, in 5 FRED I. GREENSTEIN & NEWSON W. POLSBY, HANDBOOK OF POLITICAL SCIENCE 321 (1975), reprinted in THE STRUCTURE OF PROCEDURE 284, 285 (Robert M. Cover & Owen M. Fiss eds., 1979).

19. *Id.* at 286.

20. Philip Bean, *America's Drug Courts: A New Development in Criminal Justice*, 1996 CRIM. L. REV. 718, 720.

judge is understood to be the leader of the defendant patient's "treatment team" and to be performing a therapeutic function on his or her behalf.²¹

The judicial undertakings that result from this redefinition of role are remarkable. As Nolan points out, drug treatment court judges see themselves as privileged to engage the defendants in their courtrooms on an unmediated, personal level.²² They prize "empathetic connection," often encourage hugs, and take personally the successes and failures of those who appear before them.²³ And, from time to time, they send their "clients" to jail.²⁴

The frank pragmatism of drug treatment court judges also is in tension with the substantive claim that criminal blaming and sentencing in the United States is primarily directed toward the accomplish-

21. Richard C. Boldt, *The Adversary System and Attorney Role in the Drug Treatment Court Movement*, in *DRUG COURTS: IN THEORY AND IN PRACTICE* 115, 124 (James L. Nolan, Jr. ed., 2002).

The fact that drug court judges are directly involved in the tasks of monitoring defendants' behavior and imposing sanctions or conferring rewards is more than merely stylistic. Many substance abusers in the initial stages of recovery are most likely to be helped by a treatment regime focused on "practical problem solving and the acquisition of cognitive-behavioral relapse prevention skills," which a judge is capable of managing. . . . In operational terms, this means that the judge's role in sanctioning and rewarding defendants is to help them understand that their choices have consequences for which they will be held responsible, and that they control their own fate. Thus, when the judge responds promptly to a positive urine test or a missed group therapy meeting with a proportional sanction, he or she is helping to provide treatment to the defendant.

Id. (internal citation omitted).

22. Nolan, *supra* note 15, at 34. Indeed, it is not unheard of for these judges to involve themselves in their "clients'" lives outside of the courtroom by visiting them at home or work or by sponsoring social events such as picnics. *Id.*

23. *Id.* at 34-35.

24. Nolan describes one instance in which a drug court judge's activism resulted in the forging of an employment arrangement between the judge and his client's employer, which, if breached, would result in the client's incarceration. *Id.* at 32.

A participant in Judge McKinney's Syracuse, New York drug court lost his job. McKinney called the employer and learned that the client was regarded as a "damn good employee" and that the boss would "hire him back in a heartbeat" if the judge could guarantee that he was drug free and wouldn't miss any work. So the judge made a deal with the employer. He said to him: "Okay, I'll make a deal with you, you take him back and I'll add another weapon to your arsenal. If he doesn't come to work when he is supposed to, doesn't come to work on time, if he comes to work under the influence . . . , I'll put him in jail, on your say so." [The judge told the client about the deal.] "I'll get your job back for you, but you've got to promise you'll be at work when you are supposed to and not take any drugs. Your employer is now on the team of people who are reporting to me. When he calls up and tells me that you are late or that you're not there, I'm going to send the cops out to arrest you."

Id.

ment of retributive justice.²⁵ Drug treatment courts place an enormous premium on individualized dispositions, even when this process of individualization comes at the expense of consistency in sentencing: a goal that was at the center of the decline of the rehabilitative ideal thirty years ago and that has played an important role in the dramatic growth of determinate sentencing schemes. In fact, there is good reason to conclude that the energetic support drug treatment courts have received from judges has a great deal to do with their frustration over contemporary sentencing policy.²⁶ Judges see in these courts an opportunity to redefine their role in response to the diminished judicial discretion and autonomy brought about by the determinate sentencing movement, sentencing grids and guidelines, and the straightjacket of mandatory minimum sentences.²⁷ “A common frustration expressed by drug court judges is the unwelcome constraints they experience from legislatively imposed mandatory minimum sentences. Drug courts are liberating in that they allow more flexibility in the way a judge can respond to a client.”²⁸

As Nolan and others have demonstrated, the drug court movement was not a grassroots effort; rather, it was the product of extraordinary advocacy by “a few hardworking and charismatic judges,” by Janet Reno, who had been the prosecutor in Miami when the first

25. See, e.g., CAL. PENAL CODE § 1170(a)(1) (West 2004) (“The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.”).

26. As Judge John Schwartz of the Rochester New York Drug Treatment Court explains: “Our job is to make sure justice is done. Our job is also to punish, but what’s the point of punishing if it doesn’t work. I mean, 70% of our clientele in the criminal justice system had drug problems. It’s about time we learned how to deal with them.” Nolan, *supra* note 15, at 37.

27. See Nolan, *supra* note 15, at 36 (describing the appeal of the flexible drug court model); see also McCoy, *supra* note 11, at 1529 (noting the more active role played by drug court judges).

Relatedly, the development of drug treatment courts may have something to do with a growing moral fatigue over the war on drugs. Paul Butler has made a compelling case for viewing the sentencing practices that have resulted from that “war” as inconsistent with retributive principles and particularly with the requirement that punishment be proportionate to the harm of the offender’s offense. Paul Butler, *Retribution, For Liberals*, 46 UCLA L. REV. 1873, 1892 (1999). In these terms, we simply have been over-punishing drug offenders, particularly drug possession and low-level distribution defendants. See *id.* at 1884-88 (concluding that nonviolent offenses, such as drug possession, should receive less severe punishment than violent offenses). If this is correct, the spread of drug treatment courts may have been encouraged, at least in part, by a pragmatic understanding that they provide political cover for judges who believe it is right to impose less severe penalties in drug cases.

28. Nolan, *supra* note 15, at 36.

such court was created, and by a Justice Department-led federal funding effort that pumped more than \$80 million and enormous additional resources in the form of technical assistance into the effort in its formative years.²⁹ The support of the Clinton administration's Justice Department was premised on the belief that these courts were capable of responding over time to system overload by reducing recidivism rates among criminal offenders with substance-use disorders.³⁰ The jury is still very much out on the empirical question whether drug treatment court graduates have fewer relapses and lower recidivism rates over time than comparable offenders processed through the traditional criminal system,³¹ and the current administration has not made the support of drug treatment courts a particular priority. In addition, given the sheer volume of business in the criminal courts, it

29. McCoy, *supra* note 11, at 1525-26.

[T]here has been a remarkably successful program of technical assistance and transfer of expertise from the federal level to the states. Although the idea of creating drug courts was first conceived by court professionals operating at the local level, the rapid growth of the movement as a whole was catalyzed by a considerable infusion of resources from the federal government. Once federally supported drug courts had become entrenched in local legal cultures, state and local governments began to implement drug courts on their own, without federal funding.

Id. at 1527.

30. *Id.* at 1523.

31. In 2004, the Office of National Drug Control Policy (the office of the Drug Czar) and the National Drug Court Institute released their first *National Report Card on Drug Courts*. C. WEST HUDDLESTON, III ET AL., NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 1 (2004), available at <http://www.ndci.org/publications/paintingcurrentpicture.pdf>. The report card gave these courts an A for reducing recidivism. *Id.* at 1-2. In 2002, by contrast, the General Accounting Office (GAO) published its own report, in which the GAO concluded that it "lack[ed] vital information" necessary to determine whether drug courts are effective. U.S. GEN. ACCOUNTING OFFICE, GAO-02-434, DRUG COURTS: BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS 18 (2002). In particular, the GAO report indicated that most follow-up studies, including many of the studies upon which the *National Report Card* was based, used biased comparison samples, such as offenders who declined to participate in drug court or were deemed ineligible, measured the recidivism rates of drug court graduates rather than the entire experimental group of drug court participants and generally failed to employ randomized experimental groups. See Douglas B. Marlowe et al., *A Sober Assessment of Drug Courts*, 16 FED. SENT'G REP. 153, 156 (2003) (emphasizing that additional research is needed to properly evaluate the efficacy of drug courts). The GAO published a follow-up report in 2005 that reviewed more than twenty methodologically sound evaluations of drug treatment courts. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 2-3 (2005) (explaining the selection criteria for the twenty-seven chosen evaluations). In this most recent report, the GAO concluded that drug treatment court participants do appear to have lower recidivism rates while they are "within-program" but that "[e]vidence about the effectiveness of drug court programs in reducing participants' substance use relapse is limited and mixed." *Id.* at 5-6.

is clear that drug treatment courts “have barely made a dent.”³² Nevertheless, the movement has remained vibrant, largely because judges do not want to give up the autonomy and sense of efficacy they derive from these courts. “Judges even go so far as to argue that the drug court has positive therapeutic outcomes for the judge. As two judges write, ‘judging in this non-traditional form becomes an invigorating, self-actualizing and rewarding exercise.’”³³

In the final analysis, the most interesting question about the judicial romanticism of the drug treatment court movement is whether it has had a positive or negative influence on the politics of crime control and drug policy. Criminal trial court judges are ordinary judges who generally do not challenge the authority of the political branches by passing on the constitutionality of democratically enacted laws; rather, their activism, when expressed, is most likely to grow out of their role as implementers of the law. From this perspective, drug treatment courts could be regarded as anti-democratic because they function as enclaves within which the dominant legislative commitments to retributive punishment and determinate sentencing are replaced by therapeutic interventions undertaken at the initiative of mostly unelected judges.³⁴ On the other hand, it may be that the drug treatment court movement is anti-democratic precisely because it has taken drug policy and crime control issues out of the political process or at least provided a release valve that has made it more difficult to organize broad political opposition to the still-ongoing war on drugs.³⁵ If this turns out to be the case, then drug treatment courts

32. McCoy, *supra* note 11, at 1528.

33. Nolan, *supra* note 15, at 38.

34. It is worth noting, however, that Congress and some state legislatures have adopted legislation supporting the development of drug treatment courts. “Legislatures in Florida, Idaho, New Mexico, Texas and Wyoming recently passed measures to expand drug courts.” Donna Lyons, *Conviction for Addiction*, 28 ST. LEGISLATURES 18, 20 (2002). Additionally, Title II of the 21st Century Department of Justice Appropriations Authorization Act reauthorized federal grant support for drug treatment courts. Pub. L. No. 107-273, § 2951, 116 Stat. 1758, 1795 (2002).

35. There are signs of hope that the politics of drug policy and crime control are shifting. On November 7, 2000, the Substance Abuse and Crime Prevention Act, also known as Proposition 36 (Prop. 36), was passed by sixty-one percent of California voters. Kelly Lieupo & Susan P. Weinstein, *Ballot Initiatives—Wolves in Sheep’s Clothing*, DRUG CT. REV., 2004, at 49, 56. This ballot initiative, which was vigorously opposed by drug treatment court judges throughout the state, allows first- and second-time, nonviolent drug offenders the opportunity to receive substance abuse treatment instead of incarceration. *Id.* at 57. In addition, it allocated \$120 million annually for five-and-a-half years to pay for new treatment services. Lyons, *supra* note 34, at 18. While this is still a developing story, it may be that Prop. 36 and a similar measure approved in Arizona in 1996 represent the beginnings of a new progressive politics in this area. Reformers have worked to place similar proposals on the ballot in Florida, Oregon, and a number of other states, and there is some evidence

may prove to be more therapeutic for judges than for individual defendants or for the health of the broader community.

II. UNIFIED FAMILY COURTS

Although drug treatment courts and unified family courts share a number of defining features, their origins are distinct. Unified family courts are an outgrowth of the juvenile court movement of the early twentieth century.³⁶ But unlike the early juvenile court model, which was dealt a decisive blow by the due process revolution of the 1960s and 1970s, the unified family court movement has gained momentum over the past few decades.³⁷ Unified family court systems are characterized by a holistic approach to family legal problems, an emphasis on problem-solving and alternative dispute resolution, and the provision and coordination of a comprehensive range of court-connected family services.³⁸ The goal of proceedings in a unified family court is not merely to resolve a family's legal problems but to "address the underlying psychological and emotional issues causing the dysfunction, which will result in a lessened need for further court intervention."³⁹

that the success of Prop. 36 has reshaped the public policy debate in other state legislatures. *See id.* at 20 (noting the widespread adoption of the drug court model by states following the enactment of Prop. 36).

36. Barbara A. Babb, Univ. of Baltimore Law Sch., Remarks at the Eleventh Annual Symposium on Contemporary Urban Challenges (Mar. 1, 2002), in *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 *FORDHAM URB. L.J.* 1929, 1944 (2002); *see also* Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 *FAM. L.Q.* 31, 35-36 (1998) (discussing the historical development of family courts).

37. Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 *FAM. L.Q.* 3, 13 (1998) ("In the last few years . . . more and more states have created, initiated, or experimented with, some version of unified family court in all or part of their jurisdictions.").

38. *Id.* Although the precise structure of unified family courts varies by jurisdiction, proponents and scholars have identified several components as "essential to a genuine unified family court system." *Id.* at 15. These include: (1) comprehensive subject-matter jurisdiction over family-related legal matters; (2) a "one family, one team" assignment system, designed to ensure that all matters affecting a family are handled by a single judge or judicial team; (3) an emphasis on interdisciplinary training and collaboration; and (4) the provision and coordination of a comprehensive range of court-connected family services. *Id.*; *see also* James W. Bozzomo & Gregory Scolieri, *A Survey of Unified Family Courts: An Assessment of Different Jurisdictional Models*, 42 *FAM. CT. REV.* 12, 12-13 (2004) (describing the framework and common characteristics of a unified family court).

39. Erin J. May, Note, *Social Reform for Kentucky's Judicial System: The Creation of Unified Family Courts*, 92 *KY. L.J.* 571, 584 (2004) (footnotes omitted); *see* Paul A. Williams, *A Unified Family Court for Missouri*, 63 *UMKC L. REV.* 383, 396-97 (1994) (noting that the purpose of a unified family court goes beyond dispute resolution and includes providing families with the skills necessary to avoid resorting to the legal system in the future).

Developments both within and outside of the legal system have contributed to the rise of unified family courts. The American Bar Association (ABA) has made the creation and strengthening of unified family courts a national priority and “has played a leading role nationally in developing the concepts” that underlie the unified family court movement.⁴⁰ In 1994, the ABA adopted a resolution confirming its commitment to unified family courts and articulating a set of guiding principles and components for unified family court systems.⁴¹ In 1996, with financial support from the Robert Wood Johnson Foundation, the ABA established pilot unified family courts in Georgia, Illinois, Maryland, Washington, the District of Columbia, and Puerto Rico.⁴² Over the next three years, the ABA hosted two national invitational summits designed to provide leadership and strategic planning advice to states considering the creation of unified family courts.⁴³ Since that time, the ABA has continued to provide comprehensive training, technical assistance, and ongoing consultation to court reform efforts in this area.⁴⁴

Unified family courts are also a product of changes in the substantive legal doctrines governing divorce and child-related disputes and the significant increase in caseloads that has accompanied these doctrinal changes.⁴⁵ Under the old, fault-based divorce regime, the primary role of the family court judge was to ascertain which party was to blame for the break-up of a marriage and to distribute marital assets—including children—in line with this backwards-looking determination. Parenting disputes were treated as one-time, winner-take-all proceedings, the goal of which was to award custody “rights” to the more morally and psychologically worthy parent.⁴⁶ Once the court allocated custody and other marital rights, “its role in facilitating the

40. Herbert J. Belgrad, *An Introduction to Unified Family Courts from the American Bar Association's Perspective*, 37 FAM. L.Q. 329, 329 (2003).

41. *American Bar Association Policy on Unified Family Courts*, 32 FAM. L.Q. 1 (1998).

42. Herbert J. Belgrad, *The American Bar Association and Unified Family Courts: Introduction to a Survey*, 42 FAM. CT. REV. 10, 10 (2004).

43. Belgrad, *supra* note 40, at 330.

44. Belgrad, *supra* note 42, at 10. In 2002, the ABA Board of Governors established the Unified Family Court Coordinating Council to coordinate and support the work of the various ABA entities and projects engaged with unified family courts. Belgrad, *supra* note 40, at 330. “By establishing the Coordinating Council, the ABA reaffirmed its commitment to the concepts and philosophy of the UFC system.” Belgrad, *supra* note 42, at 10.

45. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 395 (2000).

46. *Id.*

ongoing process of reorganizing the child's relationships with both parents was [largely] over."⁴⁷

With the shift from fault-based to no-fault divorce and the demise of the sole-custody paradigm, the role of the family court judge has shifted from the backward-looking task of assigning blame and adjudicating rights, to the much more forward-looking role of supervising an ongoing process of family reorganization. Family court judges no longer function primarily as fault-finders or rights adjudicators but rather as ongoing conflict managers.⁴⁸ In this respect, the judicial role in divorce-related custody cases has come to resemble its role in other child welfare matters, with the court system assuming direct responsibility for children's well-being rather than serving as a passive arbiter of disputes between adult claimants. Indeed, one leading family law scholar has analogized the role of a modern family court judge to a bankruptcy court overseeing the reorganization of a financially distressed business:

The business is raising children and the parents—the managers of the business—are in conflict about how that task is to be accomplished. The court's aim is to get the managers to voluntarily agree on a parenting plan rather than impose one on them. The court uses education and mediation to facilitate voluntary agreement. The court ratifies the parties' agreement and only decides issues that the parents cannot decide themselves. The court has an ongoing role in managing parental conflict; parents have continuing access to the settlement processes if future disputes arise or modification of the parenting plan is necessary because of changed circumstances.⁴⁹

These changes in legal doctrine were accompanied by a growing conviction that traditional adversary procedures were ill-suited for resolving family disputes, particularly those involving children.⁵⁰ Critics of adversary justice pointed to social science evidence suggesting that, particularly for children, divorce was not a one-time legal event but an ongoing emotional and psychological process.⁵¹ Research also showed that children's adjustment to divorce depended significantly on their parents' behavior during and after the separation process:

47. *Id.* at 395-96.

48. *Id.* at 396.

49. *Id.*

50. See, e.g., Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86-90 (1997).

51. Schepard, *supra* note 45, at 407.

the higher the level of parental conflict to which children were exposed, the more negative the effects of family dissolution.⁵² Other social science research suggested that, in the absence of extreme parental conflict, children generally benefited from maintaining a relationship with both parents after divorce or separation, thus undermining the traditional sole-custody paradigm with its “winner-take-all” orientation.⁵³ Armed with these social science findings, court reformers argued that, to serve children’s interests, family courts should abandon the adversary paradigm in favor of alternative approaches that would help parents manage their conflict and encourage them to develop positive post-divorce co-parenting relationships.⁵⁴

Widespread changes in the structure of American families also contributed to the pressure for family court reform. As both divorce and nonmarital parenthood have become more common, growing numbers of children are being raised by parents who are not otherwise connected to each other.⁵⁵ At the same time, shifts in gender and parenting roles have meant that fathers, as well as mothers, see themselves as active parents and are therefore likely to seek continuing involvement in a child’s life when a marriage or other adult relationship ends.⁵⁶ “Popular culture [has] reinforce[d] the notion that fathers could be nurturing parents and should assert custody rights.”⁵⁷

As a result of these demographic and cultural changes, parents are far more likely than in the past to seek judicial intervention in disputes about the care and custody of children.⁵⁸ A judiciary committed to Glendon’s classical virtues of “modesty, impartiality, re-

52. ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 205 (1994); see also Janet R. Johnston, *High-Conflict Divorce, THE FUTURE OF CHILDREN*, Spring 1994, at 165, 172-76 (summarizing research that examined the effect of parental hostility on children); Vivienne Roseby, *Uses of Psychological Testing in a Child-Focused Approach to Child Custody Evaluations*, 29 *FAM. L.Q.* 97, 101-04 (1995) (noting the effect of “high-conflict” divorce on children and recommending measures for the child custody process to mitigate the impact on children).

53. Schepard, *supra* note 45, at 396.

54. *Id.* at 406 (“These forces and the influx of cases that resulted caused a substantive and procedural transformation of the child custody dispute resolution process from fault finding and adversarial procedures to cooperative parenting and alternative dispute resolution.”).

55. See generally JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* (2000) (examining the legal and social changes that have impacted parental obligations to children).

56. Schepard, *supra* note 45, at 402.

57. *Id.* at 406.

58. See *id.* at 399 (providing statistics that demonstrate the increase in domestic relations cases).

straint, and interpretive skill” is unlikely to be able to cope effectively with these increased demands.⁵⁹

III. PROBLEM-SOLVING COURTS AND THERAPEUTIC JURISPRUDENCE

Like other problem-solving courts, drug treatment courts and unified family courts embrace the concept of therapeutic jurisprudence.⁶⁰ Therapeutic jurisprudence sees law “as a kind of therapist or therapeutic agent.”⁶¹ Legal rules and procedures and the roles of legal actors “constitute social forces that, whether intended or not, . . . often produce therapeutic or antitherapeutic consequences.”⁶² “Therapeutic jurisprudence suggests that, *other things being equal*, positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are undesirable and should be avoided or minimized.”⁶³

Like law and economics, therapeutic jurisprudence is a consequentialist theory but rather than focusing on law’s aggregate effects, it trains its consequentialist lens on individual well-being. An important goal of therapeutic justice is to maximize the positive effects of legal interventions on the social, emotional, and psychological functioning of individuals and families.⁶⁴ The problem-solving judge is a critical actor in this endeavor.

The role of the problem-solving judge stands in sharp contrast to the image of the blindfolded balancer of scales. Rather than serving as a dispassionate umpire, the problem-solving judge is charged with improving the material and psychological well-being of those who come before her.⁶⁵ Rather than resolving discrete legal issues, the problem-solving judge “attempt[s] to understand and address the un-

59. GLENDON, *supra* note 1, at 152.

60. Jeffrey A. Kuhn, *A Seven-Year Lesson on Unified Family Courts: What We Have Learned Since the 1990 National Family Court Symposium*, 32 FAM. L.Q. 67, 67-68 (1998); see also JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 7 (Bruce J. Winick & David B. Wexler eds., 2003) (characterizing therapeutic jurisprudence “as a theoretical foundation for problem-solving courts and approaches”).

61. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185 (1997).

62. *Id.*; see also William G. Schma, *Therapeutic Jurisprudence*, MICH. BAR J., Jan. 2003, at 25, 26 (defining therapeutic jurisprudence as “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects”) (internal quotation marks omitted).

63. Winick, *supra* note 61, at 188 (footnote omitted).

64. *Id.* at 189.

65. Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 339 (2003) (“A UFC has an additional and vital goal beyond simple, efficient umpiring: to make the emotional life of families and children better.”).

derlying problem” and helps participants “to effectively deal with the problem in ways that will prevent recurring court involvement.”⁶⁶ Like other therapeutic agents, problem-solving judges in both the drug treatment court and unified family court settings use their “authority to motivate individuals to accept needed services and to monitor [the parties’] compliance and progress.”⁶⁷ Thus, problem-solving judges are concerned not merely with resolving disputes or assigning responsibility but with achieving desirable behavioral change. Moreover, unlike the solitary, detached jurist who presides over a courtroom isolated from the outside world, the problem-solving judge embraces collaborative and interdisciplinary approaches. The problem-solving judge often functions as a service coordinator and team leader, connecting family members and criminal defendants to a variety of court-provided and community-based services and ensuring that all members of the treatment team fulfill their roles.

Unlike traditional judges, who limit their focus to the parties before them, the unified family court judge focuses holistically on the family as a social system:

The UFC is based on the premise that family members are interconnected emotionally, economically, and spiritually. Any court order about one family member is likely to affect all. . . . The legal label attached to the case is less important to the delivery of therapeutic justice than the ability of the court to make appropriate orders to address the underlying dynamics causing the family to come to the court’s attention in the first place.⁶⁸

This holistic orientation is reflected in the one-family, one-judge, policy endorsed by unified family court proponents.⁶⁹ The central tenet is that all matters involving the same family should be handled by a single judge (or judicial team). Proponents argue that assigning one judge to all cases involving the same family improves both the efficiency and the quality of judicial decisionmaking.⁷⁰ Critics, however,

66. Winick, *supra* note 17, at 1055.

67. *Id.* at 1060.

68. Schepard & Bozzomo, *supra* note 65, at 339-40.

69. *Id.* at 336.

70. See, e.g., Gloria Danziger, *Delinquency Jurisdiction in a Unified Family Court: Balancing Intervention, Prevention, and Adjudication*, 37 FAM. L.Q. 381, 394 (2003) (asserting that “a judge who is acquainted with the legal problems of each family member” and with “that family’s dynamics, history, and place in the community . . . can make more informed, consistent, and effective decisions than a judge who hears only one specific problem affecting that family”); see also Ross, *supra* note 37, at 17 (arguing that the one-family, one-judge policy “provides the decision-maker with a broad perspective on interrelated family

have raised concerns that the one-family, one-judge policy may violate due process because judges may have access to information about a family that would normally be inadmissible and may draw inferences from that knowledge which may compromise the ability to adjudicate a matter fairly and impartially.⁷¹

As with drug treatment courts, unified family courts combine therapeutic interventions with coercion.⁷² For example, to obtain a divorce in Maryland (and many other jurisdictions), parents may be required to attend court-sponsored parent education classes,⁷³ where they are taught to make “child-focused” decisions and to communicate with each other in ways that minimize the detrimental impact of divorce on children.⁷⁴ If parents disagree about custody or visitation, the court can require them to participate in mediation before they may present their arguments to a judge.⁷⁵

Proponents of both drug treatment courts and unified family courts recognize the potential risks posed by problem-solving techniques, and they acknowledge that therapeutic justice must be exercised in a manner consistent with due process.⁷⁶ But their prescriptions on how to do this are often disconcertingly vague. Moreover, many proponents suggest that the risks of judicial overreaching are outweighed by the shortcomings of the traditional model and the potential benefits of a therapeutic approach:

The risks that an overreaching and incompetent judge in a UFC poses for a given family pales by comparison to the chaos created for families already in crisis by a court system that organizes judicial and support services by legal issue

problems that can prove indispensable to crafting solutions appropriate to the particular family”).

71. Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 *FAM. CT. REV.* 435, 439 (2002). *But see* Jim Moye, *Don't Tread on Me to Help Me: Does the District of Columbia Family Court Act of 2001 Violate Due Process by Extolling the "One Family, One Judge" Theory?*, 57 *SMU L. REV.* 1521, 1533-35 (2004) (concluding that due process criticisms are misplaced).

72. *See* Greg Berman & John Feinblatt, *Problem-Solving Justice: A Quiet Revolution*, 86 *JUDICATURE* 182, 182 (2003) (“The bottom line is that problem-solving courts combine punishment and help in an effort both to improve public safety and prevent recidivism.”).

73. *MD. CODE ANN., FAM. LAW* § 7-103.2 (LexisNexis 1999); *MD. R.* 9-204.

74. *See* Barry B. Frieman et al., *Parenting Seminars for Divorcing Parents: One Year Later*, 33 *J. DIVORCE & REMARRIAGE* 129, 130-32 (2000) (describing seminars which help divorcing and separating parents focus on the needs of their children).

75. *MD. R.* 9-205(b)(1).

76. *E.g.*, Danziger, *supra* note 70, at 394-97; Schepard & Bozzomo, *supra* note 65, at 341-43. *See generally* Eric Lane, *Due Process and Problem-Solving Courts*, 30 *FORDHAM URB. L.J.* 955 (2003) (using case studies to explore due process issues raised by problem-solving courts).

rather than by addressing the needs of families as a whole and the interrelationships among family members.⁷⁷

IV. BEYOND DRUG TREATMENT COURTS AND UNIFIED FAMILY COURTS

Although therapeutic judging originated in specialized problem-solving courts such as drug treatment courts and unified family courts, its influence has spread to state courts of general jurisdiction. In a joint resolution adopted in 2000, the Conference of Chief Justices and the Conference of State Court Administrators endorsed the notion of problem-solving courts and calendars and the broad integration of principles of therapeutic jurisprudence into state court processes to improve the administration of justice.⁷⁸ Similarly, in 2001, the ABA recommended “the continued development of problem-solving courts to improve court processes and court outcomes for litigants, victims and communities” as well as the “broad integration of the principles and methods employed by problem-solving courts into the daily administration of justice.”⁷⁹

Based upon this mainstream support, jurisdictions around the country have established a variety of therapeutic or problem-solving courts. These include community courts that focus “primarily on low-level ‘quality of life’ crimes,” such as drug possession, disorderly conduct, and prostitution; domestic violence courts that attempt to “insure victim safety and batterer accountability” by creating an “integrated community justice response” and providing supervised treatment; and mental health courts that have been developed to link mentally ill criminal defendants with “needed services in an expedited manner and to monitor individual defendants’ progress” in treatment.⁸⁰ Indeed, a December 2003 survey found more than 1,600 problem-solving court programs operating in all fifty states and the District of Columbia.⁸¹ Several scholars have described these developments as a “quiet revolution . . . taking place in the courts.”⁸²

To the extent that state court systems have embraced these developments, Glendon’s wistful suggestion that judges in the “capillaries

77. Schepard & Bozzomo, *supra* note 65, at 341.

78. Conference of Chief Justices & Conference of State Court Administrators Resolution in Support of Problem-Solving Courts, in *JUDGING IN A THERAPEUTIC KEY*, *supra* note 60, at 113-14.

79. COMM. ON STATE JUSTICE INITIATIVES, AM. BAR ASS’N, COALITION FOR JUSTICE, REPORT TO THE HOUSE OF DELEGATES 1 (2001), available at <http://www.abanet.org/leadership/2001/117.pdf>.

80. CASEY & HEWITT, *supra* note 17, at 28.

81. HUDDLESTON ET AL., *supra* note 31, at 9 tbl.2.

82. Berman & Feinblatt, *supra* note 72, at 213.

of the legal system” retain their traditional role as restrained and disinterested umpires seems anachronistic.⁸³ Moreover, the development of both drug treatment courts and unified family courts suggests that judicial activism at the state trial level takes its cues not from the federal bench but from the political and institutional context in which state courts operate. If state trial judges have rejected classical notions of “modesty, impartiality, [and] restraint,” it is not because they are emulating an activist Supreme Court but because they are responding to powerful political and institutional forces outside the judicial system.⁸⁴ Legal scholars who seek to understand juristocracy in the trenches must therefore broaden their analytic focus to highlight the ways in which these institutional forces shape the role and influence the behavior of state court trial judges.

83. GLENDON, *supra* note 1, at 161.

84. *Id.* at 152.