

A Conversation with the Experts: The Future of Problem-Solving Courts

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**A CONVERSATION WITH THE EXPERTS:
THE FUTURE OF PROBLEM-SOLVING COURTS**

Transcript of Symposium Panel Discussion

Brenda Bratton Blom: Good afternoon. Our topic for this panel is, “What does the future hold for problem solving courts and what if any changes should be made?” Our panel represents people who have practiced, thought about, presided over and written about courts or dockets that operate in a problem-solving manner. We have heard a lot today. Somebody just asked me, “How are you doing?” and I said “My head’s about to explode; I have so much to think about.”

No one has summed up what is different about these courts as succinctly as Judge Calabresi of the Red Hook Community Justice Center. When Judge Calabresi was asked what was different about his court, he said instead of asking “What is this case about?” we ask “What brought you here?” Whether in a specialty docket like drug court or mental health court or truancy court, each of these dockets ask the question, “Why are you here?” As prosecutors, defenders, judges or social workers, the questions that we must struggle with today have to do with how we answer that question while maintaining the fundamental tenets of our system that provide justice for all who walk through the doors of our courts. I want to introduce our panel, then talk about how we are going to run this panel, and then move into the heart of the discussion.

To my left is the Honorable Jamey Hueston. She is an associate judge of the District Court of Maryland in Baltimore City. She is the presiding judge in the Adult Drug Treatment Court program and chair of the Problem-Solving Court Committee of the Maryland Judicial Conference. She has served on the Drug Treatment Court Oversight Committee, has chaired the Truancy Court Workgroup, and is the president of the Maryland Teen Court Board. After beginning her legal career as an Assistant State’s Attorney in Baltimore City, she served with distinction on many committees and commissions of the bench and bar. She has had a distinguished career and we welcome her to the panel.

Next to her is Mark Peyrot, who received his doctorate in sociology from the University of California Los Angeles and served as a post-doctoral fellow in behavioral science at the University of Kentucky Medical Center. He is a professor of sociology at Loyola College and has an appointment on the research faculty in the School

of Medicine at Johns Hopkins. In Baltimore, he has worked on issues related to substance abuse treatment and prevention in jails, indigenous neighborhood efforts for substance abuse control, integration of substance abuse treatment provider systems and substance abuse treatment for high risk adolescents, as well other issues. Welcome, Dr. Peyrot.

Next to him is Stacy Burns, who is an associate professor of sociology and the department chair of Loyola Marymount University in Los Angeles. She received her law degree from Yale and a doctorate from the University of California Los Angeles. She practiced plaintiff's law in California for ten years before taking the plunge as an academic. Dr. Burns currently chairs the Crime and Juvenile Delinquency Division of the Society for the Study of Social Problems. She has authored and edited three books, one with Dr. Peyrot. She has studied and published in many journals about therapeutic jurisprudence, social control, and social problems.

Next to her is Mae Quinn, a professor of law and co-director of the Civil Justice Clinic at Washington University in St. Louis. She is a national leader in clinical legal education. She specializes in juvenile defense representation and problem solving courts. In addition to leading the Civil Justice Clinic, she also teaches criminal law. Before arriving at Washington University this fall, she was on the faculty of the University of Tennessee College of Law, where she was honored with the 2009 Harold C. Warner Teaching Award and the 2008 Woman of Achievement Chancellor's Award. Before joining academia, Professor Quinn worked for several years as a New York City public defender, handling trials, appeals, and post-conviction proceedings, and as an associate attorney with a prominent white collar criminal defense firm. She also worked with the Center for Court Innovation to review the implications of problem solving courts. We are delighted she is here with us today.

And last, but certainly not least, Tamar Meekins is the director of the Clinical Law Center and an associate professor of law at Howard University. I have had the pleasure of getting to know Professor Meekins through our intersecting work as clinic directors in the mid-Atlantic region. She joined the faculty of Howard University in July of 2002 after working as an associate attorney at the law firm of Dewey, Ballantine, Bushby, Palmer & Wood and then as an attorney in the District of Columbia Public Defender Service, where she started as a staff attorney and later served as the Chief of the Trial Division and finally as the Chief of Legal Services. She served for a

time as the Deputy Director of the Office of Citizen Complaint Review, which is an independent D.C. government agency. She has served on numerous boards and commissions in D.C. and nationally. Professor Meekins teaches in the Criminal Justice Clinic and her research interests are in the areas of criminal law, lawyering skills and the administration of criminal justice, trial litigation, and ethics. She has written on the “new good courts” and specialty courts. We welcome her to the panel and this afternoon’s discussion as well.

The format for this panel discussion is that we are going to pose and discuss a set of questions. We will spend about an hour in this discussion and then we will open it up for dialogue with the audience as well. It has been said several times today that the value of this symposium is having a conversation, so we really want that to happen. I think that there is not a person among us, at least on this panel, who has not put a stake in this question somewhere. Once you do that, the question of whether or not you are opening your heart and head to the conversation rather than “staking” is an important thing to experience. We are going to attempt to model that “conversation” at a high and sophisticated level, so we will see how it goes.

Judge Hueston, given that there are now several sets of best practices out there that have been suggested by different, major organizations—the National Association of Criminal Defense Lawyers has just done one, the National Association of Drug Court Professionals has had a set of best practices for quite some time, and others have taken this step toward best practices—how do you see the conversation about problem solving courts unfolding in local jurisdictions?

Jamey Hueston: I will answer by telling a story. During a recent graduation, a defendant said to me “Judge, I lost my job. I lost my car. I lost my apartment. I lost my significant other. I lost my children. I now have cancer. I have lost this eye because I didn’t take care of it. I lost, most importantly, my self esteem. After having gone through Drug Court, I’ve gotten all that back, bit by bit.” Not every situation, not every defendant, not every participant is a success story—far from it. Drug courts are not the only answer to this very difficult problem. But Baltimore City is very similar to many jurisdictions in Maryland as well as across the country. The person who told me that story is typical of most of the people who enter drug court. Our target population is comprised of adults using heroin or cocaine, or both (“speedballing”) for usually five to thirty years—

probably closer to the ten to twenty year range—at approximately fifty to two hundred dollars worth of drugs each day (very few use less than fifty dollars a day and many use more than two hundred dollars a day); and who have committed numerous crimes to support their habits. Every single person who enters drug court in Baltimore City, at any level, would be going to jail but for drug court, and with fairly significant sentences.

We cannot afford to deal with low-level offenders because drug court is more expensive than the regular way of doing business. It takes a lot of effort and tremendous structure and support to help folks that are high need and high value targets. Because it is so expensive compared to the regular way of doing business, our goal is to achieve the biggest bang for the buck. Our statistics show that we actually do better with the defendants I described than low-level offenders who do not need that kind of supervision. I have told some folks who request drug court, “No, thank goodness your problems are not bad enough. Don’t commit more crime to get in, but you don’t really need us at this point.”

Our program is typical of what is going on in Baltimore, the state, and across the country. We do not target low-level offenders—”defendant light.” This is the challenge for jurisdictions—defendants are in the criminal justice system anyway and most of them do not seek treatment on their own. When I ask the question, “You have been using heroine for twenty years, have you ever gotten help?” the answer is generally “no” or very watered down treatment. We must provide very detailed, very strenuous structure to try and help those who have had very little success in their life and who have shown very little responsibility. By doing so we are able to get them moving in the right direction. Our statistics and evaluations show much better results for those folks than the normal way of doing business. In fact, one evaluator once congratulated our program for saving millions of dollars despite having “the worst target population in the country!” If we can be successful, almost anybody else can be as well.

Our program has a tremendous impact because our participants are committing approximately three crimes each time they use heroin, and many use all day. If drug court reduces the usage of a defendant even by half, then we reduce the amount of theft and child neglect, for example, and the police are also less engaged. Drug Court affirmatively decreases the victimization of citizens and the impression that their communities are under siege. We also collaborate with local jurisdictions, communities, businesses and the police to access support

services that augment treatment and diminish problems that contribute to the drug problem.

I liken drug courts to black holes—if you get near, I am going to suck you in. We have support from the Maryland Transit Authority to provide tokens. We have connections with Goodwill to provide jobs as well as new career training. We provide mediation services and acupuncture inside and outside of jail. We have case managers that are not available in normal probation services, a social worker that addresses mental health issues, and family support and life skills training. We collaborate with the YMCA for passes, and the list goes on. All of these local commitments and buy-in to drug courts have helped to make folks whole. It is challenging to motivate people, but with that kind of collaboration, even in a restrictive setting of a criminal justice system, we are able to make tremendous headway that is not available in a regular probation situation. That didn't answer the question, did it?

Blom: I thought that was great. Mark, do you want to talk about what happens in local settings? It looks like you are doing a lot of work here in Baltimore.

Mark Peyrot: Let me just say, first of all, that I am a researcher rather than a practitioner, so I do not have a position from within the [problem-solving court] setting about which to speak. However, I do a lot of observational research regarding these kinds of things, going back to the '70s, when looking at treatment in legal settings was first becoming prominent, all the way up through today. One remark I would like to pick up on is tied to what Judge Hueston said earlier—that “courts are black holes.” I do not disagree with that, but I would say that they are more like a “black box.”¹ I am not sure that there is really good evidence about best practices, if what you mean is that there have been randomized studies which break out all of the interventions that are seen as part of the drug court. We have a study that takes *this* component by itself, and then adds *this* component with *that* component, but what the impact really is remains unclear. Although we have descriptions of generally what is inside the “black box,” once it comes to evaluating it, we treat it as just a “black box.” For example, in the case that Judge Hueston opened with, she

mentioned a series of things.² Graduation ceremonies, for example, are those important? Sometimes those are part of drug court, sometimes they are not. Sometimes people import these components into settings that are not drug court settings. Is it important that a drug court have time set aside when all the drug court clients are seen simultaneously in a single session? Would it be the same if they were seen one at a time because of the therapeutic elements? At this point, I think the “best practices” are based upon professional standards more than hard research.

We do have some research, as Professor Richard Boldt mentioned when talking earlier about evaluations, but those tend to be “black box” or “holistic” types of evaluations.³ I think that, before we are going to be able to say what the active ingredients of an effective drug court are, we need to take a different and more nuanced orientation towards evaluating these courts. We will need to determine whether it is just the judge, for example, or the judge doing *this* particular aspect of it or *that* particular aspect of it. When we get to that stage, we will have a much stronger empirical basis for rolling out the programs in a way that perhaps could avoid some of the problems that have been mentioned by a number of the speakers. Maybe those problematic elements are not the key active ingredients and we do not really need the things that are most problematic if we focus on these other things that are the really important pieces. So my perspective is that there is research that could be done to help us make those decisions.

Blom: Mae, I hear the call for research and for randomized studies of the problem-solving court process, but I am not sure that we have ever done randomized studies of the traditional court process.. So maybe you can talk about your research in terms of what we have learned historically about courts and tie that to the call for more rigorous analysis and evaluation.

Mae Quinn: Earlier in today’s symposium, Professor Shdaimah noted that there has been talk that the current problem-solving court movement is not all that new. But she wondered whether we needed to look back to see whether this has happened before historically or if the real question is, “Where do we go from here?” Regardless of the

2. See *supra* Judge Hueston’s comments at 139–41.

3. See Richard C. Boldt, *The “Tomahawk” and the “Healing Balm”*: *Drug Treatment Courts in Theory and Practice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 21 (2010).

approach we ultimately take, I do think that it is important for us to address those who are calling for reform now and suggesting that this is a brand new movement. They are not taking account of the fact that this very same kind of “innovative” process has occurred before in the courts in this country. When the same people who are calling for reform are saying “we are the first ones to do this,” but not acknowledging that it has taken place before, it raises questions in my mind about the credibility of that movement generally.

Historically in this country, there have been other movements that were very much like this one. My research focuses on New York and the work of an early judge, one of the first female judges in this country, Anna Moscowitz Kross. Kross created problem-solving institutions within New York City’s police court system starting in the 1930’s. She established specialized courts—very focused courts—that sought to address social problems. Remarkably, some of the very same language used in today’s literature, like “get at the root causes” and reference to a “carrot-and-stick-like approach,” was being used back in the 1930’s, 40’s and 50’s in the courts she was creating.

Judge Kross began her legal career by trying to dismantle the Women’s Court system in New York City, which was the precursor, I argue, to the prostitution courts that we see today. She insisted that although they were well-intended at the outset and sought to assist the women who came through their doors, the Women’s Courts turned into problematic institutions. Ultimately, sanctions given out by those courts were often more punitive than traditional courts, their practices promoted a method of policing that was objectionable, and private anti-prostitution interests were taking control of the Women’s Court. As I have written, we still see some of that today in another setting—the Midtown Community Court in New York. That modern court did not necessarily solve the problem of prostitution in midtown Manhattan, but just changed it in a particular way—pushed it out to other areas.⁴

When Kross’s efforts to dismantle the Women’s Courts were unsuccessful, she changed course. Instead, she created an alternative within the same system. Out of that initial Women’s Court she spun out another institution, something called the “Wayward Minors’ Court.” That specialty court dealt with young women between the ages

4. For more on the comparison of the Women’s Court and the Midtown Community Court, see Mae C. Quinn, *Revisiting Anna Moscowitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, 33 *FORDHAM URB. L. J.* 665 (2006).

of sixteen and twenty-one who were considered “sexual delinquents.” And the very same kinds of processes used in today’s problem-solving courts—purportedly diversionary processes intended to take women out of the criminal justice system by providing alternatives to incarceration—were attempted.⁵

Kross also took that kind of problem-solving orientation into the domestic violence realm. I argue that she created the first domestic violence courts in New York in the 1940’s. With soldiers returning from World War II, there was an increase in domestic violence complaints in New York City. In the face of that change in caseload, she created another specialized court called the Home Term Court. She engaged in other kinds of problem-solving around other societal issues as well.⁶

Beyond this, not only did Kross use the very same kind of language you hear today—emphasizing the need to get at the root causes to address societal problems—but like today’s reformers she seemed to be arguing, well-intended though she was, out of both sides of her mouth. That is, she claimed that she wanted to get folks out of the criminal justice system but in fact was ensnaring them, causing them to become more involved in the criminal justice system. Also like today’s reformers, she began to privatize court operations. She brought in outside volunteers because the institutions she was creating required so many more resources. She used her private volunteers to help supervise defendants. In fact, she created two non-profit organizations that were staffed by well-intentioned community members—very much like what we are hearing about in the community courts today—which played a role in shaping the goals of the courts, informing its agenda, and also reporting back to the courts. What is problematic about that structure is that it allows for private individuals to use the courts to voice their own personal views about the ways folks live their lives. Then the criminal justice system does, in fact, become a “black hole” as Judge Hueston suggested, pulling people in. It becomes this place where you are controlling people and

5. For more on the Wayward Minors' Court and the ways in which it compares to today's problem solving courts, see Mae C. Quinn, *The Modern Problem Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Court Reform*, 31 WASH. U. J. L. & POL'Y 57 (2009).

6. For more on the Home Term Court and its relationship to today's domestic violence courts, see Mae C. Quinn, *Anna Moscovitz Kross and the Home Term Part: A Second Look at the Nation's First Criminal Domestic Violence Court*, 41 AKRON L. REV. 733 (2008).

the way they live. It is not about crime control at that point—it is life control.⁷

Ultimately, Kross's courts were all abandoned or shut down. I have written several articles about Kross and am knee deep in the research for a book or two. What does my research suggest so far? Remarkably, Kross's courts were established pre-*Gideon*; they arose before a constitutional right to counsel in these kinds of cases. One of the big issues that she had to confront was her critics. Some complained that defendants in her courts were unrepresented. They worried these were well-meaning courts that were supposed to be diverting people from the criminal justice system, but instead were taking control of people's lives. Yet these defendants often were without any type of representation. I believe this was one of the main issues that led to the demise of these courts. You also had commentators complaining that the specialty courts created nothing but a patchwork approach.

And as was noted earlier by former Maryland Public Defender Nancy Forster during her keynote address, how many problems can we seek to solve through the criminal justice system? The funding just was not there to solve all the problems Kross wanted to solve. There were great promises made at the outset. Very much like the Center for Court Innovation, and other promoters of today's problem-solving courts, Kross engaged in self-promotion—she wrote op-ed pieces, drafted white papers, appeared on radio shows and the like to build this up. She, too, was getting folks to “drink her Kool-Aid.”⁸ But at the end of the day there just wasn't sufficient money and sufficient science to back up what she was doing.

Her critics also said “you just don't know enough”—evoking the “black box” phenomenon that was mentioned earlier—you do not really know enough about what you are doing. And that is particularly problematic when you are engaging community and other members in this kind of court-based rehabilitative work. From my perspective based upon the history, I think we have a lot of work to do yet to

7. For more on Kross's court volunteer groups and the issues surrounding lay court caseworkers, see Mae C. Quinn, For more on Kross's court volunteer groups and the issues surrounding lay court caseworkers, see Mae C. Quinn, “*Feminizing Courts*”: *Lay Volunteers and the Integration of Social Work in Progressive Reform*, in *FEMINIST LEGAL HISTORY* (forthcoming 2010).

8. In fact, the reference to “drinking the Kool-Aid” was first made during the remarks of Professor Jane Spinak earlier in the conference, describing the methods of enthusiastic modern court reformers.

figure out if these are courts that can really work, and if so, at what expense.

Tamar Meekins: As I was driving up here from D.C., I was thinking about what I would say, and I kept telling myself “don’t say ‘drink the Kool-Aid.’” [*laughter*] I was sitting throughout the day I was thinking, “Who’s gonna say it first?” It better not be me. So, Mae, thank you—I don’t have to say it.

What I think is interesting is that a lot of these same issues have already been played out in a totally different setting and at a totally different time, but yet, in this modern reconstruction of problem-solving courts, which I sometimes call “problem-creating” courts, we have some of the same issues that have come up amidst all of the good that can be done as well. Like Professor Spinak, I find myself, as a practitioner and as a teacher, thinking “boy, I’m a bit of a schizophrenic.” On one hand, I really like these courts, but on the other hand, I think that there are so many problems that can come out of them that we really have to be very cautious as a lot of people have said. I am really pleased that these new standards and tenets that are coming out now, have started to become more common because I see the trend towards these new modern problem-solving courts.

There were quite a few organizations that talked about these courts in the early days and had very positive things to say about them and were actually “drinking the Kool-Aid” in terms of the same model of those courts being hallowed as “the best model.” Now more organizations are looking critically at those courts and different processes within the courts and trying to determine best practices—how we can achieve some of the great things that it sounds like Judge Hueston is getting in her court while at the same time protecting some of our very important ideals in the criminal justice system. I applaud the National Association of Criminal Defense Lawyers for engaging in this massive look at problem solving courts.⁹ The American Bar Association is also reviewing them; it has set up a task force to study problem-solving courts, specialized courts, and diversion in an effort to develop standards.

9. See NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM (Sept. 2009), *available at* [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/\\$FILE/problem-solving_report_92809.pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/$FILE/problem-solving_report_92809.pdf).

The question that Brenda [Bratton Blom] first posed was, “what is going to happen after all of these standards, tenets and principles are created?” I really do not know if I can answer that question because I do not know what is going to happen. Like Mrs. Forster said during her keynote address at lunch, these standards are going to be voluntary and different courts around the country may look at them or may not. One might say, “we are getting results in our jurisdiction because I can point to those two success stories that we had ten years ago, so I know my court is working” and we will not have rules that these courts *have* to follow. So, I don’t know where we are going, but at least the discussion focuses on the processes, the things that are happening in the courts that present problems for our ideal of a criminal justice system that really works for everyone.

In terms of research and additional empirical analysis, we really need to do a lot more of that. As a defense lawyer, I do not think that we do enough research about the perceptions defendants who are in these courts have regarding whether they are really receiving justice, rather than focusing on just the success stories. I think that the Center for Court Innovation and many others go to the success stories and say “ma’am or sir, how were you treated in drug court?” “Oh, it was great for me!” But they don’t go to the person who failed out of drug court and was sent to jail for five years and did not get the services that they needed and was not able to succeed in drug court. They do not go to that person and see what it is that caused them to not complete drug court successfully, or whatever kind of court it was, what else they needed and their perception of whether the system was right for them. So, I hope that some of that can be done as we engage more and more in critical evaluations of these courts.

Blom: I want to do one thing. I want to really push back against the panel and urge us to not use “drinking the Kool-Aid” because the reality is you could say we all “drank the Kool-Aid” in that ninety percent of every case that comes into the system is settled, in terms of the number of things that go to trial in the abstract. It is true that any time you get something new going, there is going to be a lot of enthusiasm to get some momentum, but I would urge us to just back off of that frame because I think it really diminishes the thinking and the critical analysis that people have spent trying to make something different happen. So, I am going to push back on the panel a little bit to disaggregate that as a metaphor for what it is that people have been

doing for fifteen years or more, and really suggest that the phrase does not get us where we want to go.

Quinn: In response to that, I actually think it is important to recognize that this is a very different phenomenon which is taking place to a certain degree in the cracks and spaces between the three branches of government. To the extent that the term “drink the Kool-Aid” was used in a flip way, no one is meaning to disrespect folks. I do think that proponents of problem-solving justice are well-intended. I do think, as was noted earlier, that a lot of people engaged in this work want to help in some way.

But this is a very different phenomenon than what students in law school think about, in terms of courts and government operating and changing. You read in the law books about how things happen constitutionally in our courts and in the legislative and the executive branches. What we are talking about now is quite different. It involves a sort of “movement” aspect affirmatively bringing people together around particular court practices through a compelling government-sponsored public education campaign. Reformers seek to convert courts to problem-solving institutions through their advocacy. As I say, this is very different except as compared to what I saw in Kross’s work. Yes, it’s a flip phrase, but I think it is relevant in the context of the movement’s work and an important aspect of what we are critiquing.

Blom: I would suggest that probably within a new model that there is movement, there is critique, and there is something else that comes out of the other side of that. Stacy?

Stacy Burns: I come from California where we are oftentimes at the forefront of criminal justice innovations and we have been evolving a lot of new, different, and developing problem solving courts. I spent a lot of my time last summer in southern California looking at the range of problem solving courts and one of the interesting courts that we have there is a veteran’s court. The drug court judge actually has a community justice center and sits on all of the different specialized dockets, some of which are pretty innovative. She noticed that veterans were not doing well in regular drug court, which underscores that the complexity of these co-occurring issues is something that really has to be addressed. The judge created a separate veteran’s court and when you observe what is going on there, you can see that it really is a distinctive culture. When the defendants come up

to address the judge, they are standing at what my husband (who was in the military) calls “parade rest.” You can sit back in the audience and see all of this. They found that [the veterans] were doing a lot better having some unique features that the judge was trying to innovate, such as bringing in retired vets to mentor people going through the program.

Just to get back to the judge, I do not think that all judges are fungible. There is such a variety in terms of standards and practices, not only in how these things are implemented across the country in various courts, but also just in the skill level of the judges. In doing courtroom observations, you see a lot of variability; some judges are very good at it, and others are not good at it. When you see a great, really committed problem-solving judge leave to handle a purely criminal docket, it is disappointing because the substitute comes in and it is just not working as well anymore. So, in terms of standardization, I think we can learn a lot by getting effective judges involved in training other judges to try to unpack that “black box” in terms of identifying the skills that are making commitment to treatment and motivation work from the perspective of the people going through the program. I can tell from [Judge Hueston’s] comments that [she] is one of those very committed, effective judges.

The moderator, Professor Blom, raised a question about the quote by Judge Calabresi in the Red Hook Community Court: “Why are you here?” I think that there is some irony in that question. One of the things that the Southern California judge has done in creating this criminal justice community is that outside the courtroom door there are all the social services available and so everyone from the community is encouraged to go seek those services before they enter the courtroom door and there are instructions to police in terms of policing practices. “Here are the available services. Can you try to manage the situation without an arrest wherever possible?”

So the whole idea of criminalization is a big deal and I think that in terms of community courts, and specific types of community courts, such as homeless courts, there are definitely best practices and not-so-best practices. The American Civil Liberties Union (ACLU) and other groups brought lawsuits against some supposedly very politically progressive cities in southern California, including Laguna Beach—that are very, very upscale areas and had some history of being humanitarian—for harassing the homeless, which a friend of

mine calls, “the war on sleep.”¹⁰ So, I think that things like prosecutorial charging patterns and policing practices are also something to address, instead of just taking the position that “Well they are in the court system so we have to handle it.” I think that best practices address other ways of managing these issues as well as developing community resources and making them available outside the courtroom door.

Hueston: It is so interesting to hear these comments; programs only improve by hearing the other side. If everybody is just saying “yes,” the program cannot strengthen, so I appreciate the debate. But I am not sure that I am living in the same town that you are. Things that you complained of do not resemble what I think most drug courts look like, especially those in Baltimore City. Not every person in drug courts across the country has an attorney, unfortunately. We do not have public defender staffing for everyone in drug court or problem-solving court—I object to that. Thank goodness in Baltimore we are fortunate, as no hearing occurs without an attorney. This is not just the Star Chamber, which is the impression that I get by listening to non-practitioners who may feel that horrible abuses are taking place. For the most part, that is simply not correct.

For the courts that do not have public defender representation it can be difficult, and extra caution must be taken to ensure that rights are protected. I wholeheartedly support that everyone should have an attorney and in Baltimore City at every level, *everyone* does. However, I want to correct the impression that we are trampling on people’s liberties. There is an attorney at every single session who advocates when appropriate and, by the way, who has agreed to the drug court or problem-solving court model before we even opened the doors. All problem-solving court programs need to be tweaked; there is nothing as constant as change in my court. We are constantly improving our standards and protocols, and they have all been agreed upon. You have heard a list of issues regarding drug courts from the panelists and from Mrs. Forster during the keynote that were problematic and needed to be changed. In reality though, the concerning policies and procedures that surfaced in the drug court manuals were not exercised in actual practice. They were promptly excluded from the manuals when brought to our attention.

10. Greg Katz, *City Sued Over Alleged Homeless Harassment*, L.A. DAILY J. Jul. 15, 2009, at 1.

Quinn: May I respond?

Blom: Absolutely, and I guess I would like to ask you to go back to something that you talked about before a little bit, which is “net widening.” Certainly one of the big tensions has been about at what level problem-solving courts are appropriate. When are they net widening and when are they not?

Quinn: Your Honor has raised an important point, maybe not realizing it. Actually not all drug treatment courts are probation-based models like yours. There are pre-plea models, post-plea models, and probation models. When the literature puts out there that drug courts “work,” it fails to account for these differences. So what I have been arguing from the very beginning of the movement is that instead of the Department of Justice (DOJ) throwing millions and millions of dollars at individualized experiments across the country, what they should be doing is fostering best practices—scientifically and legally. You know that I do not necessarily agree with the model. But if we are going to do it, if we are going to press on with the movement, let’s try to do it with some controls. Do it with some greater testing. Create one model and then tweak it, and tweak it, and tweak it again to make sure that this one works. And if it does, now we can go forward and give out more money to expand the project.

And there have actually been many instances in problem-solving courts across the country where people are unrepresented. For instance, the state of Tennessee has legislatively adopted the Ten Key Components that the DOJ unilaterally drafted and essentially said “if you want our federal dollars, you have to have your courts operate in this way and that means a teamwork approach.”¹¹ Not only has Tennessee legislatively adopted those Ten Key Components, but it has added to them. That is, the law provides that not only will there be a non-adversarial teamwork approach in the courts—that we all engage in this problem-solving together—but there will be no challenges on the record to alleged treatment violations.¹² And so they are taking, by

11. For more on the 10 Key Components, see BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997), available at <http://www.ojp.usdoj.gov/BJA/grant/DrugCourts/DefiningDC.pdf>.

12. See Tennessee Drug Treatment Court Act, T.C.A § 16-22-104 (codifying the 10 Key Components as Tennessee's Drug Treatment Court operating principles, including adoption of a "nonadversarial approach" within the courts); § 16-22-103(3) ("Nonadversarial approach" means that the district attorney general and the defense attorney work together for the benefit of the drug court treatment program participants and the program. Any disagreements are to

legislation, certain features of the court off the record and putting them behind the scenes without the sort of regular and public “due process” checks that we would expect in courts. So it *is* happening.

And it *has been* happening. I practiced in a problem-solving court in the Bronx, and fortunately, in many ways it was a terrific court. We had a wonderful judge—demonstrating that the quality of these courts is very much driven by personalities—who did a lot to try to protect our client’s rights. But very often cases were called without lawyers being present. In fact, I wrote an article about this issue while practicing in the court. I was one of the first people on the defense side to write about this problem a decade ago. I hope, maybe in some ways, that article has helped inspire a little bit of change in the courts themselves over these last few years.¹³

In terms of the net widening and changing court culture, I am not a social scientist. I have not collected the data. But I can give you an example from the Bronx Drug Treatment Court, the drug court that I was practicing in some years back. That court targeted first time felony drug offenders. It was my understanding that before the creation of drug court, most of those people would have been probation eligible anyway. That is, the prosecution would have offered, “if you plead straight up without a trial to a somewhat lesser charge, we’ll put you on regular probation.” And that regular probation would have lasted for a particular duration of time. Then the drug court comes to town. The prosecutors say, “if you enter into this program which is eighteen to twenty-four months, you can graduate and possibly have a clean record. But if you fail to successfully complete, you’ll get an indeterminate sentence of two to six years”—*two to six years*. And this is the kind of drug charge that, absent any plea agreement, if the person pled guilty straight up to the charged offense in front of the judge, they would have likely gotten the minimum provided by law, an indeterminate sentence of one to three years. That is, the going rate changed because of the creation of the drug court. Is that illegal? No, it’s not illegal. Does it raise questions about what we’re doing? Yes. And when the DOJ is supporting that kind of change in culture, it raises questions for me. And there is the net widening that also goes along with that. Suddenly a case that might

be resolved prior to court and not in front of the participants...”); see also Tenn. Op. Atty. Gen., No. 03-009 (Jan. 24, 2003)(public defenders do not have a duty to appear at Tennessee drug court proceedings unless they involve a possible deprivation of the defendant's liberty).

13. See Mae C. Quinn, *Whose Team am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practices*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000-2001).

have been dismissed earlier, or perhaps might have been handled in a different way, is dealt with more formally and brought into the drug court net.¹⁴

Blom: Dr. Peyrot, can you talk a little bit about your experience in the studies that you have done in Baltimore about whether or not you feel like you are witnessing a net widening effect—in other words, people and crimes that would not have been arrested and charged are being arrested and charged, rather than sent to community-based services?

Peyrot: Well I cannot comment using statistical data, but I can provide a historical context. What tends to happen in social control situations is, the more palatable the form of social control, the easier it is to extend it over a broader arena. So, back in the '70's with the influx of drug use amongst young people, especially white middle-class college students, one of the things that made enforcement of the drug laws palatable was probation before judgment (PBJ) because now we could arrest them, but we could let them go as well.¹⁵ So, that sort of sucked the wind out of the sails of the legalization or decriminalization effort because now it did not seem so bad to criminalize what might be seen as a public health issue. My sense is that the therapeutic jurisprudence concept similarly makes it easier to say, "well, it's okay." Now again, I cannot quote statistics but if you are looking at public opinion, the concept that, "well, now we are not locking them up, we are helping them" makes the effort to intervene in people's lives something that people feel more comfortable with. I do not know if that affects police, I do not know if that affects judges or District Attorneys, but it does alter public opinion, and how far that extends into the system, I really could not comment.

Blom: Professor Meekins, given that the bar is struggling with this nationally and most of us do not get to go to the American Bar Association conventions, how do you see this conversation unfolding and what are the ways that we can strengthen the system for attorneys who are in courts day after day after day?

14. For more on this change in sentencing rates and the possibility of net-widening, see *id.*

15. See generally Mark Peyrot, *Cycles of Social Problem Development: The Case of Drug Abuse*, 25 *Soc. Q.*, 83, 83–95 (1984).

Meekins: Well, I think that in terms of what the bar is struggling with in the context of setting standards—those standards are not going to be specific enough to give practitioners who are on the front lines any real guidance as to the real issues. I supervise students who appear in drug courts or community courts all the time and I, in fact, appear before these courts myself. The things that are at issue for me as a practitioner, and I suppose for the prosecutor who is in there, potentially the judge, potentially the social workers, is this notion of how our role is affected by the model being different.

This model is different from regular adjudication of cases; it is less adversarial and we are all supposed to be part of a team. And so, I need to know how I should navigate those things when I am on the front lines. In terms of the American Bar Association, National Association of Criminal Defense Lawyers, and National Legal Aid and Defender Association standards,¹⁶ those guidelines look more at larger macro issues, such as what the problem-solving court should stand for, that the problem solving court should adhere to making sure that all defendants have a right to counsel—but what does that really mean? They do not really get to the front line issues and so we are still going to see practitioners struggling with those issues every day.

I have an example. I appeared before a drug court judge a couple of months ago. My client had been sent to drug court several months before and was in violation. And so we were coming in to court, trying to find out what was going to happen to us—are we going to get kicked out or are we going to be given another opportunity? And I am an adversarial defender. I get up there and fight, fight, fight. I just do it—that is the way I was trained. So, I stood before the judge and the judge started asking my client questions, and that happens in these courts, right? You have that interaction—whether praise or questions—and it is a relationship between the judge and the defendant. I am standing there and the judge is asking my client questions and I'm like "Okay, wait a minute." I know that I need to step in, but strategically, where am I going to step in? I want my client to stay in this program because this program is going to keep my client out of jail and is going to give her some assistance in her daily life and with her drug problem. But the judge is stepping over the line a little bit, so I need to step in at this point. So, I came down on the side of the

16. See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS (2002), *available at* <http://www.nlada.org/DMS/Documents/1019501190.93/Ten%20Tenets-Final%20ACCD%20version.doc>.

adversarial defender and I said, “Your Honor, excuse me, may I be heard?” And I start giving the explanation for her behavior, whatever happened in that particular instance. And the judge said to me, “Counsel, I’m not going to have that. This is drug court. I get to ask her questions and she has agreed to answer them because she’s in this program. You can just be quiet.” I was like “wait a minute, this is the District of Columbia and the judge just told me ‘to be quiet’” and I’m a lawyer and so I’m like “wait a minute, there might even be some of my students sitting in the audience, I can’t just be quiet.” But I was in there thinking “Okay, what do I do?” I mean, this is an ethical issue for me as well as an issue of zealous representation. I have written a couple of articles about this,¹⁷ I teach students about this; if I am struggling with it, then I am sure everybody else is too. I look around the courtroom at some people like, “what should I do?” and basically see blank faces. I think that illustrates the point that it is very difficult for standards and guidelines to affect what is happening on the ground level when we are talking about a whole different way of looking at adjudicating cases.

I do think that no matter how I look at it and try to be balanced about it, it is problematic when my client may be forced to participate in drug court because she wants treatment and she doesn’t want to go to jail. She is forced in a lot of ways. One of the speakers this morning talked a little bit about coercion—my client is coerced into answering those questions and saying things that are against her interest. I didn’t say “best interest,” because I am only concerned with her interest, not her “best interest.” Coercion is very problematic and I think that we have to have the discussion on a different level. It is okay to have this discussion on the ABA level—the guidelines, the standards level—that is totally necessary and I am all for that, but we also have to do more at the ground level.

In response to your question about what we should do, I think we have to have a lot more training. When I say “training” I mean training about what we mean when we talk about treatment, what we

17. See Tamar M. Meekins, *Risky Business: Criminal Specialty Courts And The Ethical Obligations Of The Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007); see also Tamar M. Meekins, “Specialized Justice:” *The Over-Emergence Of Specialty Courts And The Threat Of A New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006); see also Tamar M. Meekins, *You Can Teach Old Defenders New Tricks: Sentencing Lessons From Specialty Courts*, 21 SUM. CRIM. JUST. 28 (2006); see also Tamar M. Meekins, *Are The New “Good Courts” Just Too Good To Be True?*, 21 SPG. CRIM. JUST. 57 (2006) (reviewing GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (The New Press, 2005)).

mean when we are talking about “curing” and solving problems, as well as ethical training. We have to come up with some sort of framework that allows people on that ground level to be able to negotiate these issues in a way that is consistent with their role in the criminal justice system and protecting the stated interests of their client.

Burns: I just wanted to say that the way they have dealt with it in Los Angeles County is that when you are in regular drug treatment court, the defense attorney and prosecutor execute what is known as a “MOU”—that is, a memorandum of understanding—agreeing that no disclosures made in court or in treatment will be used as the basis for further charges and prosecution. When California net-widened to make drug treatment more broadly available by passing Proposition 36,¹⁸ there was no parallel memorandum of understanding system. One of the judges told me in an interview that as a result of that, she does not ask the same kinds of what you might call “therapeutic questions” that she does ask in her drug treatment court because she is afraid that something might come out that could be used against the client. So, as a former public defender, she is actually in a role where she’s protecting the rights of the defendants in that net widened Prop 36 court.

Hueston: When I rotate new judges into drug court, I advise that sentencing is at their own discretion. The only requirement is that each judge must follow the drug court philosophy of treatment—repairing people’s lives, trying to reintegrate them with the family, keeping them on the street, and incarcerating as a last option. Everyone working in the dug court is there because they buy into the philosophy, and we all live and die by the key components. The Ten Key Components have been promulgated by the Drug Court Association and are adopted by every single drug court, all 2,400 or so throughout the country, and throughout the world. These key components are comprehensive in a broad way and guide us as to what to do and when to do it. Problem-solving courts are just not randomly

18. California’s Proposition 36 (Prop 36), also known as the “Substance Abuse and Crime Prevention Act” (SACPA), effective July 2001, initiates for the first time on a massive scale the court-supervised drug treatment that began a decade earlier with California’s first drug court. The law mandates that most defendants convicted of non-violent drug possession and use offenses (i.e., excluding drug crimes related to manufacture or sale) be sentenced to probation and drug treatment, *not incarceration*. CAL. PENAL CODE § 1210.1(a) (West 2004).

following some problem solving agenda; there is guidance and standards, although not necessarily laws.

There is also substantial training on the local, state and federal level, and training at every single discipline level. We provide training to new judges, and on a state level. The federal government also gives millions of training dollars. There are standards and practices by which drug courts abide. To be sure, there may be a rogue court and strained situations which you don't like. But for the vast part, there are standards that are followed and that have been evaluated. There is actually information in the Dove-Marlow studies that show how the standards are making progress and how they are benefiting defendants.

We are not net widening enough to reach as many people as we should. Most drug courts throughout the country are not taking first time offenders, they are taking the hard-core addicted people. There are always exceptions to the rule but actually, the recommendations by the Drug Court Association as well as the evaluations show by far that the vast amount of drug courts are probation courts, no longer pre-plea. The majority are for the addicted, long-term, chronic offender. There are vagaries depending on the judge and the court, but the studies that show that generally, the judge makes a big difference. One of the main hallmarks of drug courts and problem-solving courts is the relationship between the defendant and the judge. Before you get to court, most drug courts and problem solving courts have staffing conferences at which the defense attorney and state's attorneys, treatment, probation, case managers discuss each defendant's case. It is surprising that Professor Meekins was there without having known what was going on before she got to court.

Meekins: We do not have staffing.

Hueston: I'm sure there are courts that don't, but most do. It is a best practice. The best we can do is a practice, we can't legislate that. Most courts have staffings to discuss what will happen to ensure that everyone is on the same page.

I'll leave my comment with this: I think it has been well documented that business as usual does not work. Probation agents have hundreds of probationers on their dockets preventing them from effectively monitoring the chronic defendant. We have a choice to throw the baby out with the bath water and continue business as usual. However, there is very little treatment in jail and people typically recidivate within three months after release. In the alternative, in the

context of the criminal justice system, drug courts have been extensively evaluated to be productive. Otherwise, if we continue to manage the criminal justice system the same way, we are going to get the same results.

Problem-solving courts should be refined consistently, but the basic premise is very sound and there is a tremendous amount of evidence to support the concept. This criminal justice innovation has been evaluated more than any other innovation in the history of mankind. I am going to stick to that [*laughter*]. It sure seems like that, anyway. By being innovative and by changing the roles of the team members without, of course, sacrificing due process, we begin to address the tremendous social problems driven by drug addiction. We should not continue to do things that have not worked the same tired way and expect things to improve.

Blom: Okay, we are going to take a little while, twenty minutes or so, and open this up to questions to broaden the conversation.

Peyrot: Can I say one thing?

Blom: Sure.

Peyrot: This goes to the net widening question and the broader policy questions. It is clear that this movement is expanding. Whether it should or shouldn't, that is a different question entirely. So then the question is: What are the consequences of that expansion? You can see this in California, which Stacy alluded to with her comments about Proposition 36,¹⁹ which has essentially mandated that these kinds of courts are going to handle all non-violent offenders (or the vast majority). The problem with that has been that it will require tremendous court resources, because now we need more than just a few judges who have this training and expertise, we need many, many more treatment resources. If treatment is the essential component of drug courts—one of the key ingredients, if not *the* key ingredient—doesn't that indicate that the amount of funds that we spend on treatment would also grow astronomically?

That is what they are facing in California since public opinion determined that this is something that the state should do.²⁰ Public

19. See *supra* Professor Burns' comments at 155–56.

20. The state initiative process is “the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” Cal. CONST. art. II, § 8(a). For a

opinion is essentially mandating tremendous expansion in courts' adjudicative capacity and treatment capacity. The downside is that the taxpayers do not want to pay for it, so they are mandating the system on the one hand, but not mandating the resources. Then, what is the future of drug court and net widening? Remember what I said about the dilution of social control? Well, it looks like treatment intensity is going to become less and less because the same treatment dollars are going to go to more and more people. That is what takes us back to the '70's when people were told, "go find treatment—if you find it, let us know, because that will affect how we will handle you in the PBJ decision." I studied those settings and observed that when a participant would come in and say, "Well, I have a case and I am going to court. I don't really think I have a problem, but I need a letter for court," the provider would say, "well, we do need some clients because we don't have that many clients." What got negotiated would not be what we would call "a therapeutic alliance," but it stood as treatment, and if you look at the statistics, these people were defined as being "in treatment."²¹

I realize that this audience is primarily practitioner-oriented, but I think that we also have to take a step back and think about the policy issues that are coming down the road and what we should be bringing into the policy forums to consider as far as the nature of the work. I would take it that Judge Hueston would say, "net widening is not a good idea; let's stay with the hard cases and not assume that now everybody is going to be successful in this setting," but you need a lot of probation cases without treatment in order to save enough treatment slots for the others who go through problem-solving courts. I do not know the answer to that the problem of finite resources, but I think there is a lot of research to be done. I don't know that "hard cases make bad law," but I would say that "no research makes bad policy."

Blom: Before I open it up, is there any other panelist that has one last thing that they would like to say?

Burns: Yes, as of July 1, 2009 California eliminated roughly eighty percent of the funding for dedicated Prop 36 courts in Los

discussion of the implementation of the recent initiative regarding drug courts in California, see Stacy Burns & Mark Peyrot, *Standardizing Social Problems Solutions: The Case of Court-Supervised Drug Treatment*, in 17 RESEARCH IN SOCIAL PROBLEMS AND PUBLIC POLICY, 205–37 (2010).

21. Mark Peyrot, *Coerced Voluntarism: The Micropolitics of Drug Treatment*, 13 J. CONTEMP. ETHNOGRAPHY 343, 343–65 (1985).

Angeles County because of the budget crisis,²² which basically turns it into something like the earlier diversion. The net widening is just not affordable right now, even though there are pockets of experimentation to evolve innovative and new forms of problem solving courts.

22. *Prop. 36 Treatment Dollars Up in Smoke*, <http://zev.lacounty.gov/news/economy-news/Prop-36-treatment-dollars-up-in-smoke> (2009), (last visited Dec. 19, 2009).