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If one values freedom, tolerance, and civil liberties, we live at a time when our planet is a dangerous place. Even if one accepts the notion that mankind is composed of decent and good human beings, not all societies place a premium on the values of freedom, tolerance, and civil liberties for all. While there are many factors that promote justice, judicial independence is the cornerstone to freedom and liberty. Now more than at other times in history, a strong, effective, and independent judiciary is imperative. Now more than ever, judges need to realize that maintaining an impartial independent judiciary is their responsibility.

In the eighteenth century, Montesquieu noted that a resolute judiciary is the only check on the executive branch, because it is the only protection a citizen has of their civil rights. Montesquieu thought judicial independence was the most important safeguard in our system of government to protect individual rights, including life, liberty, and property. Similarly, Alexander Hamilton argued that "the complete independence of the courts is peculiarly essential in a limited constitution," noting "that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[1] He concluded that an independent judiciary was "an essential safeguard against the effects of occasional ill humors in the society" that lead to the enactment of "unjust and partial laws."[2]

Historians agree that judicial independence, newly established in the United States, was firmly secured in 1803 when Chief Justice Marshall wrote, in *Marbury v. Madison*,[3] "It is emphatically the province and duty of the judicial department to say what the law is." He continued by quoting the oath of office for a judge:

> I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States.[4]

Although his leadership and opinion in *Marbury* was at the time controversial, Marshall provides today's judicial leaders a model as to how courts should do what is right and just, even if it is unpopular and not politically advisable.

Most of today's discussions about judicial independence center on the degree to which a court may freely adjudicate cases without outside pressures impacting the decisions. For the judges of many state courts, the most obvious source of pressure is the electorate. However, while there are gross abuses in the electoral process that infringe on judicial independence for most of the nearly 28,000 state and municipal judges, there is less of a threat from the electorate than many would like to concede. Judicial independence is not absolute independence. Judicial independence is a means to an end, not an end in itself. Judges should function to promote democracy and civil rights, but cannot easily maintain their role as independent and impartial arbitrators if they are isolated from answering to anyone. Communities have a right to expect that courts will not just be independent, but fair, impartial, and effective in dealing with the problems that confront them as well.

Problem-solving courts are part of the way to be more effective. Problem-solving courts need not be a threat to fairness and impartiality, but they can be. Some have argued that problem-solving courts place judges in untenable positions that undermine judicial independence. They argue that due process requires that judges must refrain from any role other than that of neutral arbiter, listening to two (or more) sides presenting an issue and then deciding between them. They argue that it is impossible for judges to do more—that you can have due process *or* you can have a problem-solving judge, but that you cannot have both. False choices like this represent a tyranny of limited thought and an unnecessary limit on the ability of judges to perform the work today's society and its problems require.

Judicial independence is easily understood and accepted when a judge acts in the traditional role of judge as a neutral, impartial decision maker. However, when problem-solving courts were created a century ago, innovative judges and court personnel redefined the role of the court and the judge. Today it is worth asking, what if the threat to judicial independence and impartiality is not external? What if the threat is from well-meaning and well-intentioned members of the judiciary or traditional allies of judicial independence?

The original problem-solving court, a juvenile court, was created a century ago in Chicago, and within 25 years the con-

Footnotes

1. The Federalist No. 78 (Alexander Hamilton).
2. *Id.*
3. 5 U.S. 137, 177 (1803).
4. *Id.* at 180.

cept had spread nationwide. When these juvenile courts originated, a primary goal was rehabilitation. Children are our future and the impetus for the creation of the juvenile court was the promise that courts could surely do better with our future than the courts were doing at the time. The original juvenile court was to determine and cure the juvenile's problem. To reach its goal, the court had to determine "what [the juvenile] is, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."[5] Ideally, each disposition was to be customized to fit the child, such that the child would grow into a productive, useful adult citizen and put the errors of his youth behind him.

To distinguish this original problem-solving court from the other courts of the time, the founders used different terminology from that used in criminal court in an effort to clearly distinguish the two courts. Accordingly, a juvenile was a delinquent, not a criminal, and was adjudicated, not found guilty. A juvenile was held in detention, not jail, and if it was long-term, it was a "school," "camp," or "program" where the juvenile stayed, but not a prison. A juvenile was not sentenced, but committed.

As Shakespeare wrote, "What's in a name? That which we call a rose by any other word would smell as sweet."[6] While the juvenile court founders intended the vocabulary to distinguish juvenile court, words are not what distinguish the court. The founders' theory only works if the "schools" and "camps" actually treat the child and are not just words masking punishment or prison.

In the original juvenile courts, the role of the judge was different from a traditional judge. Ideally, it was thought that the juvenile judge would not focus solely on guilt or innocence but on what forces and events in the child's life combined to bring the child to appear before the judge. An early description of the ideal juvenile court judge was a concerned parent, psychiatrist, and social worker wrapped up in a black robe who could guide a youth away from a negative life.

The early juvenile courts disregarded some of the established rules of law and the constitution by "rethinking" concepts of due process and creating new rules of evidence peculiar to the juvenile court. The court's founders believed that due process and some rules of evidence made it more difficult, if not impossible, to focus solely on what the child's best interests were. The original juvenile courts even discouraged the presence of lawyers as they would only add a burden to the court by introducing technicalities.

In making the decision to turn away from the fundamental constitutional principles to which every adult defendant had a right, juvenile courts felt that these rights were not in the child's best interest, since it was thought that the rights limited the judge's ability to do what was best for the child. No doubt the founders of the original juvenile courts had good intentions, but the concept removed an important check of the executive and legislative branches by removing the judicial safeguard that by design was to protect individual rights. This erosion of judicial impartiality and independence came from within the judicial branch, not from external forces as Montesquieu and Hamilton had feared might happen, but the effect was just as destructive.

As with any innovative idea, there is a period of struggle to figure out what works best.

Juvenile courts have helped millions of children. They were a good idea when they were founded and remain so today. Over time, juvenile courts recognized that juveniles were entitled to their constitutional rights and that ignoring one's constitutional rights is not in anyone's best interest. In holding that juveniles are entitled to the same constitutional rights as adults, Justice Fortas said in *In re Gault*:

> The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. . . . Juvenile court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of your juvenile courts. . . ." The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[7]

As with any innovative idea, there is a period of struggle to figure out what works best. Post-*Gault*, the rules of evidence and due process were introduced back into juvenile court, and throughout the nation, lawyers, albeit frequently overworked, are present to represent the juveniles. The judge as a compassionate and caring parental substitute is still a model. However, judges who work in juvenile court must work to also maintain judicial fairness, impartiality, and effectiveness.

For decades, juvenile court was the only specialized problem-solving court, but today many people realize that problem-solving courts are beneficial in that they allow judges to focus on similar types of cases and defendants. As a result, more problem-solving courts, including drug, domestic abuse, community, and mental-health courts, have been created.

Drug court developed in response to the increase in drug crimes and the judiciary recognizing that the addictions of many of the defendants controlled their actions. The first recognized drug court opened in Miami in 1989. In the 15 years since it opened 1,470 additional drug courts have been created across the United States. While there are wide differences in the program details of these courts, the goal of drug courts is

5. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909).
6. WILLIAM SHAKESPEARE, ROMEO AND JULIET, act 2, sc. 2.
7. In re Gault, 387 U.S. 1, 17-19 (1967). *See also* Kent v. U.S., 383 U.S. 541 (1966).

simple—to strengthen supervision of defendants participating in drug treatment programs, to reduce recidivism, to build productive citizens, and to save prison space for violent offenders. Just as with the invention of the juvenile court, however, many of the proponents of drug courts designed these courts by "redefining" concepts of evidence, the role of lawyers, and due process. Many of the early proponents of drug courts thought that the adversary process itself threatened the effectiveness of their courts.

It is very conservatively estimated that 16% of the nation's prison population have serious mental illnesses. Many believe that a more accurate estimate is nearly 35%. Any judge who sits on an arraignment calendar in a major city knows the problem—the laudable goal of deinstitutionalization of the mentally ill swept too many into the criminal justice system. With the success generated by many drug courts, problem-solving courts have begun to deal with mentally ill offenders through mental-health courts. In mental-health court, the objective is to help the defendant receive proper treatment rather than simply a jail or prison sentence. Just as with the drug and juvenile problem-solving courts, one of the judge's roles is to balance the needs of the defendant against the needs of his or her family, while always remembering to consider public safety.

Like the founders of juvenile court, frequently the founders of new drug, mental-health, or other problem-solving courts believe that the defendants in these courts should not be "confined by the concept of justice alone." Regrettably, it is argued that there is a conflict between the goals of the problem-solving courts and constitutional rights of due process.

The challenge for all problem-solving courts is balancing the role of the judiciary. An important lesson learned from the early juvenile courts is that a judge cannot abandon his or her neutral role in the justice process, no matter how noble the cause. The judge can become a partner with the key players in the problem-solving courts, but there is a tyranny of the "or" that presents a severe threat to problem-solving courts. The tyranny of the "or" poses the choice as treatment for addiction *or* surrendering a defendant's right to due process. Treatment or surrendering your right to due process are not choices that are necessary, but rather represent the evil created by the tyranny of the "or." The tyranny of the "or" is a viral poison that limits the possibility of problem-solving courts as an accepted approach to more universally dealing with the problems confronting the nation's courts. More importantly, the tyranny is a viral poison that can undermine judicial independence, fairness, and impartiality.

Every judge, regardless of assignment, struggles to find the balance between neutrality and caring, but this is especially important in problem-solving courts. In the context of the problem-solving court, the judge's role is not the typical role of referee between two adversaries, but rather a judge is a ship's captain, directing the course of the ship or the court. Steering a ship during the storms that becloud the justice system is not an easy task.

The answers to the balance between appropriate interdependence and abandoning neutrality are never clear cut. Minnesota Chief Justice Kathleen Blatz has championed the Children's Justice Initiative (CJI). CJI is a project to shift the focus of the child-protection system to better serve the child. It focuses on a safe, stable, and permanent place for the child in a nurturing family. To achieve this, CJI revolves around child-centered decision making, while protecting the due process of all parties, recognizing cultural and social differences, and holding the system accountable. A century after the creation of juvenile court and a quarter century after the growth of problem-solving courts, CJI is setting goals and beginning to measure performance in juvenile court. For example, CJI has a goal that "proceedings are conducted in a fair manner with strong judicial oversight." The table found in Figure 1 illustrates how this goal is measured by CJI.

It is possible to measure the effectiveness of problem-solving courts in part by measuring tangible outcomes, such as the response time of the court, the timeliness of the proceedings, and the sufficiency of representation. These are important and easily ascertainable data that do in part explain a court's performance. However, the performance measures need to go a step further. Problem-solving courts need to ask such questions as: Is the court perceived as being fair to litigants and other constituents? Do litigants perceive they are being listened to? Do litigants understand the orders given by the

FIGURE 1: MINNESOTA CHILDREN'S JUSTICE INITIATIVE

STANDARD	MEASURE	2002	2003
Guardian ad litem (GAL) is assigned on all cases	Percent of children appointed or assigned a GAL	88%	91.6%
Adjudication or dismissal occurs within 60 days of the first hearing	Average number of days between first hearing and adjudication	94.8	96.2
	Percent of children for whom adjudication occurred within 60 days of first hearing	56.1%	52.8%
In-court review hearings are held at least every 90 days	Average number of days between disposition and first in-court review hearing	128.1	84.5
	Percent of children for whom first in-court review hearing occurred within 90 days of disposition	56.7%	68.4%

court? All courts, regardless of whether they view themselves as problem solving or not, enhance their independence if they are held accountable for their answers to these questions. The best strategy for problem-solving courts to minimize the risk that the tyranny of the "or" presents is to adopt these types of performance measures.

One of the unfortunate side effects of urbanization is the disconnect that can occur between government and the governed. Courts in an urban setting, like other parts of government, can lose their connection to the problems facing the community. The result is not just a lack of effectiveness but the erosion of public trust and confidence that courts need in order to thrive. Problem-solving courts need not be specialized dockets, but can also be a court's global response to a beleaguered community's problems. Community court is a problem-solving court, but one that presents yet another challenge for judicial independence. The issue for community court is not just to maintain the commitment to individual litigants' right to an independent, fair, and due-process-oriented court. The issue for the community court is the community connection itself.

Perhaps the most notable example of a successful community court is the Red Hook Community Justice Center in Brooklyn.[8] About a decade ago, a multi-jurisdictional court was created that combined criminal, civil, and family matters that arose from the police precincts in the neighborhoods. Benefits of this court include community service directly in the community for small-time offenders, and the public is much more aware of what the penalties are for the worst offenders. Since this problem-solving court opened, crime in the Red Hook District has decreased 60%. The presence of the problem-solving court in the community in which the problems arise increases the community feeling safe in their own homes, as well as feeling that there is meaningful access to justice in an urban setting for non-criminal matters. Community confidence may be a less tangible measurement of the effectiveness of problem-solving courts than the specialized version of case-type courts, but the results are just as important.

There is no reason to fear community court. In fact, judicial independence, fairness, and effectiveness can be strengthened through appropriate interdependence with the community and other branches of government. The success of a problem-solving court like the community court in the Red Hook District of Brooklyn demonstrates that the judges are far more effective when they are aware of the problems and of the successes in the community and resources that can be assembled to assist the court. The community court in Red Hook is successful in large part because of an open, visible working relationship between the community and the justice system. There is benefit that flows from restorative justice initiatives that involve the community beyond the positive impact on any particular defendant. Public trust and confidence in the judicial branch is enhanced if the community sees that judges care. Judges who are familiar with the community are better able to customize the punishment to the crime and the offender. This in turn allows the community to see justice in action and government being responsive.

All courts . . . enhance their independence if they are held accountable for their answers to these questions.

Traditions of judicial neutrality and detachment are bedrock; however, if judges wear blinders that shield them from seeing the resources and outcomes of courts, they cannot be effective in modern society. Unfortunately, that is exactly what some judicial ethicists and traditional allies of judicial independence want from their judges—neutrality to the point of isolation from becoming familiar or working with the resources of the problem-solving court.

States have different traditions about the appropriate collaboration of the judiciary with the community or the executive and legislative branches. Programs such as Minnesota's Children Justice Institute and the Red Hook Community Court encourage judges to work with organizations that may have an interest in a case outcome. Collaboration to effect systemwide improvement is the mantra of those involved in problem-solving courts. Sometimes the mantra can be misunderstood. Some attempts to limit a judge's activities outside the courtroom simply undermine the potential of courts to appropriately work with the community.

In Texas recently, a family-court judge was criticized and alleged to have committed misconduct when his impartiality was called into question because he was a board member for a local child-protection organization. The family-court judge must rule on whether a child should be removed from his or her parents and placed in state custody. Therefore, in the minds of some Texas commentators, the alleged misconduct occurred because the family-court judge's position on boards could impact his ultimate rulings on custody cases.

The role of a judge is changing. While there are always reasons for judicial leaders to be cautious about change, particularly when it comes to ethical rules, it is proper and necessary for a judge to be active in policy formation in virtually every problem-solving court. Judicial codes are perfectly understandable when they prevent judges from creating personal conflicts of interest by serving on boards that may appear before them in court. The line of demarcation is more difficult to ascertain when the court itself is designed to foster a new relationship between the judiciary and the community. The approach advocated by some in Texas and, to be fair to Texas, in other jurisdictions, is yet another variation on the tyranny of the "or." It's just as viral and just as destructive. Collaboration

8. For an overview of the Red Hook Community Court, *see* GREG BERMAN, RED HOOK DIARY: PLANNING A COMMUNITY COURT (1998), *available at* http://www.courtinnovation.org/pdf/redhook_diary.pdf (last visited October 5, 2004). For general information about Red Hook Community Court, see the website of the Center for Court Innovation at http://www.courtinnovation.org/demo_09rhcjc.html (last visited October 5, 2004). For an overview of community courts generally, *see* David Rottman, Community Courts: Prospects and Limits (2002), *available at* http://www.ncsconline.org/wc/publications/Res_CtComm_Prospects&LimitsPub.pdf (last visited October 5, 2004).

and interdependence with others *or* impartiality and fairness are not mutually exclusive.

Judges are in a unique position to serve as a mechanism for reform outside of the courtroom. Judicial canons support and even encourage this role. In 2002, in *Republican Party of Minnesota v. White*,[9] the U.S. Supreme Court held that a judicial canon preventing judicial candidates from speaking regarding disputed legal and political issues was a violation of the First Amendment. *White* is viewed by many in the judicial community as undermining judicial independence. Viewed in another light, the case stands for a broader point that enables problem-solving judges to make the administration of justice more effective. In delivering the Court's opinion, Justice Scalia noted that judges are not only permitted, but are encouraged to state their opinions outside the context of adjudication on disputed issues in forums such as classrooms, books, and speeches.[10] Being appointed or elected to the bench does not create a cone of silence that may only be lifted when issuing orders in the courtroom.

In New York's 2004 state of the judiciary speech,[11] Chief Justice Judith Kaye quoted a line from an editorial, which stated, "Being a judge should be a source of pride, not patronage."[12] She continued:

> It is indeed a privilege—the greatest privilege imaginable—to sit in judgment on fellow human beings, to review challenged acts of government, to declare justice. Judges, above all, feel it. With privilege, of course, comes the heavy responsibility to make good decisions in individual cases, to treat people with dignity and sensitivity, and to safeguard the efficacy and integrity of the process.[13]

Judges speaking out should come not only when they see a way to improve things, but when changes have worked. Such as the judge from upstate New York, who wrote to Chief Justice Kaye:

> "I for one single-handedly attest to the revolution in the criminal justice system with the advent of the drug treatment court and domestic violence court. Today, we do it a lot better than it was done yesterday. . . . I am a local judge positively affecting the lives of many people in my community. A great blessing I cherish."[14]

Not every judge is comfortable advocating for change. Not every judge necessarily has the skills to be good at that type of advocacy and system change. Some other judges believe it is not their role to speak out about problems with how the mentally ill or drug addicted are treated in court. These judges are sincere and care about the problems. Those attitudes present the final tyranny of the "or" that problem-solving courts face. Either you are an advocate for problem solving *or* an out-of-touch mechanical jurist.

Problem-solving courts and the judges who preside in them must be able to be innovative and outspoken about how to deal with the litigants in these courts. To advance their cause, they need to make converts of many of their judicial colleagues. What made nearly all of the early problem-solving courts effective was not just the bells and whistles of the courts, but an attitude in everyone in the courtroom that the judiciary cared and the judiciary listened. All judges will enhance this discussion if they resist the tyranny of the "or." The tyranny of the "or" is the true threat to judicial independence, not problem-solving courts.

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9. 536 U.S. 764 (2002).
10. *Id.* at 779.
11. Judith Kaye, The State of the Judiciary: 2004 (February 9, 2004), *available at* http://www.courts.state.ny.us/ctapps/soj.htm (last visited October 5, 2004).
12. *Id.* at 23.
13. *Id.*
14. *Id.* at 10.