

JUDICIAL LEADERSHIP

by

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Leadership for Lawyers
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Introduction

“A judge shall perform the duties of judicial office impartially and diligently. A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.”¹

Judges occupy a unique position in society. While a judge is definitely in a position of power and authority, the traditional hallmarks of a leader, a judge is not permitted to represent or advocate one position above another. Rather, the judge is neutral, one who objectively adjudicates the specific conflict before him according to the rule of law. This paper will explore the ways in which judges can be leaders while adhering to the necessary impartiality of their office.

Judicial Power - The Traditional Role of the Judge

The judiciary gets its authority from Article III of the United States Constitution. Among other things, it states that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....”² Although the doctrine of judicial supremacy was not established without dispute, it is now settled that courts have the inherent authority to interpret the law and determine their constitutionality.³ It is important to point out that the judiciary can only hear cases that are actually in controversy; cases which have adverse parties with proper standing to bring the action.⁴ As such, judges cannot raise controversies from the bench *sua sponte*.

¹ Model Code of Judicial Conduct Canon 3 (2004).

² U.S. Const. art III, § 2.

³ Marbury v. Madison, 5 U.S. 137 (1803).

⁴ Muskrat v. United States, 219 U.S. 346 (1911).

One of the fundamental principles of the constitutional system of the United States is that power is divided and shared among the three branches of government -- the legislative, executive, and judicial.⁵ The purpose of the legislative branch is to pass the laws, the executive branch approves and executes the laws, and the role of the judiciary is to interpret and enforce the law.⁶ The separation of powers doctrine forbids one branch of government to exercise powers properly belonging to another branch.⁷ As such, a judge has often been limited to their traditional role as an uninvolved interpreter of the law and protector of procedural fairness.

Judicial Leadership - The Changing Role of the Judge

Given the constitutional limitations on the power that the judiciary is allowed to wield, as well as the ethical constraints as set forth above, it is valid to question whether a judge is able to exercise the five principles of exemplary leadership as outlined in The Leadership Challenge: 1. model the way, 2. inspire a shared vision, 3. challenge the process, 4. enable others to act, and 5. encourage the heart.⁸ The Honorable Philip Pennypacker of the Santa Clara County Superior Court doesn't think these principles are incompatible with the role of a judge. In fact, Judge Pennypacker states that the process of the problem-solving courts adopts all of these practices.⁹

Problem-solving or "specialty" courts embrace the concept of therapeutic jurisprudence which sees the law as a kind of therapeutic agent and which tries to

⁵ Springer v. Government of Philippine Islands, 277 U.S. 189, 201 (1928).

⁶ Richardson v. Board of Dentistry, 913 S.W.2d 446, 453 (Tenn. 1995).

⁷ The Federalist No. 47 (James Madison).

⁸ James M. Kouzes & Barry Z. Posner, The Leadership Challenge, 3rd Edition 22 (2002).

⁹ Interview with Philip H. Pennypacker, Judge, Superior Court of California, County of Santa Clara, in San Jose, Cal. (Apr. 6, 2007).

maximize the positive effects of legal intervention, rather than focusing strictly on adjudicating guilt or innocence and imposing punishment.¹⁰ Problem-solving courts “attempt to understand and address the underlying problem” and help participants “effectively deal with the problem in ways that will prevent recurring court involvement.”¹¹ There are many different types of problem-solving courts¹², including those that focus on crimes involving substance abuse and domestic violence. The common denominator in all of these courts is their need for the judge to take an active leadership role.

Judge Pennypacker, who has served on the Santa Clara County drug court and is currently serving on its domestic violence court, was able to clarify how judicial leadership is essential to the success of these programs. He states that the objectives of their domestic violence courts are to: 1. guarantee family and public safety, 2. get the batterer in to a program, complete it and learn from it, and 3. punish the people that require punishment.¹³ In achieving these goals the judge acts as the point person who rallies, organizes and directs those involved, including the defendant, district attorney, public defender, social services, etc., to work together toward a successful result.

¹⁰ Richard Boldt and Jana Singer, The Maryland/Georgetown Constitutional Law Schmooze: Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts, 65 Md. L. Rev. 82, 95-96 (2006).

¹¹ Bruce J. Winick, Therapeutic Jurisprudence and Problem Solving Courts, 30 Fordham Urb. L.J. 1055 (2003).

¹² There are also mental health courts for defendants who would normally be overwhelmed in a regular court setting. So rather than setting the person up to fail, the mental health courts take their limitations in to account by not overwhelming them with excessively complex probation requirements and setting them up with the appropriate social service agency to help them through the process. Interview with Philip H. Pennypacker, Judge, Superior Court of California, County of Santa Clara, in San Jose, Cal. (Apr. 6, 2007).

¹³ Id.

Judge Pennypacker described the process when a person is arrested on a domestic violence charge. Instead of going through the regular criminal process, where the defendant immediately “cops a plea” or goes to trial, domestic violence defendants are sent to one of three judges in Santa Clara County on the domestic violence court. There is a pre-trial conference where the judge, district attorney, public defender and defendant get together to figure out how they can settle the case. At this phase 95% of those accused of domestic violence are allowed to plead guilty and be entered in to a 52-week program¹⁴ rather than sent to a regular criminal court and face the possibility of prison.

Next the judge is responsible for overseeing the progress of the person through the program, including determining if they are not following through on their commitments. This is accomplished through further collaboration, now with the probation department and community service organizations, and includes confirming enrollment in the intervention program and reviewing their progress at in-person meetings with the judge. If the individual doesn’t show up, then the judge issues a no-bail bench warrant and reminds them of their responsibilities and the consequences if they don’t follow through. After two incidences of non-compliance the judge schedules the person on the violation of probation calendar and they are “whacked.”¹⁵ Laurence Kay, a retired California appellate judge and current chair of the Judicial Council Domestic Violence Practice and Procedure Task Force, agrees that “domestic violence

¹⁴ For a misdemeanor there is 20 days of up-front county jail time and weekend work before entering the program. Id.

¹⁵ Presumably sent to jail or prison (depending on the charge they pled guilty to) rather than “whacked” in the Sopranos vernacular. Id.

cases require not only extraordinary care but also the essential presence of judicial leadership.”¹⁶

Problem-solving courts are a relatively new phenomenon and the movement from adversarial criminal litigation to innovative jurisprudence began in response to different types of problems which were found to be unresponsive to the traditional criminal process. The family courts are an outgrowth of the juvenile court movement and can have jurisdiction over a wide range of issues that affect families, often including domestic violence, juvenile delinquency, child abuse and neglect, divorce, custody, and child support subject matter.¹⁷ It is a court that addresses legal, social, and emotional issues by tailoring the jurisprudence to the individual family's unique needs. Chief among these needs is the continuity and leadership provided by the judge, so they don't have to tell their story over and over again or get lost in a bureaucracy.¹⁸

The need for specialized drug courts began to be apparent in the mid-1980s as a result of the dramatic increase of drug-related cases due to the “War on Drugs.”¹⁹ Though the initial goal of the drug courts was to expedite the criminal process, some judges noticed that they kept seeing the same defendants over and over again, despite repeated punishment for their wrong-doing. One of these judges, Peggy Hora of the Alameda County Superior Court, decided to do some research and see “what is going

¹⁶ Laurence D. Kay, An Open Letter to the California Judiciary: Administration of Justice in Domestic Violence Cases, 6 J. Center for Fam. Child. & Cts. 164, 166 (2005).

¹⁷ 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).

¹⁸ Id.

¹⁹ Richard Boldt and Jana Singer, The Maryland/Georgetown Constitutional Law Schmooze: Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts, 65 Md. L. Rev. 82, 84 (2006).

on with these folks that is so terribly different” from her “whole life and world experience?”²⁰ She educated herself on the issues of addiction and began leading statewide conferences on drugs to educate other jurists on the issue. Judge Hora created the nation’s second²¹ drug treatment court in Oakland in 1991²² to address the root cause of 90% of her cases. When asked if judges should be the ones providing these social service interventions Judge Hora’s answer was, “if not us, who?”²³

Despite the positive results and the inherent logic in addressing the root cause of a chronic problem rather than simply demanding punishment time and time again, there are those who don’t believe that the end should justify the means. Judge James Yates of the New York County Supreme Court doesn’t believe that a model “founded on regularized coercion as a means to an end should be expanded beyond the low-level infractions it was intended to address.”²⁴ Judge Yates’ primary concern revolves around the concept that problem-solving courts are founded on the premise that all those who enter are “guilty and must abandon all hope or vindication of rights.”²⁵ He postulates that in New York those who want to escape incarceration and receive

²⁰ Peggy Hora, Alameda County Superior Court, 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. 2011, 2027 (2002).

²¹ The first was established in Dade County, Florida in 1989.

²² Peggy Hora, Alameda County Superior Court, 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. 2011, 2027 (2002); The Superior Court of California Drug Court Services, <http://www.alameda.courts.ca.gov/dcs/aboutdcs.html> (last visited April 21, 2007).

²³ Peggy Hora, Alameda County Superior Court, 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. 2011, 2030 (2002).

²⁴ James A Yates, New York County Superior Court, 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. 2011, 2021 (2002).

²⁵ Id. at 2021-2022.

treatment under their Drug Treatment Alternative-to-Prison Program must agree to give up many of their Constitutional rights, such as the right to bail, the right to suppress illegally obtained evidence, and the right to seek a jury trial.²⁶ Judge Yates argues that the surrender of these rights and the unprecedented control over the individual asserted by the judge smack of a paternalism incompatible with our system of democracy.²⁷

So in the context of specialty courts the judge is able to embrace leadership principles of collaborative and innovative jurisprudence, rather than being limited by their traditional role as the solitary, detached jurist who presides over a courtroom isolated from the real world.²⁸ And while some would suggest that it is not the province of judges to work outside the letter of the law, the words of Justice Holmes, noting the importance of taking account of human experiences in the law, should be remembered:

“The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”²⁹

²⁶ James A Yates, New York County Superior Court, 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. 2011, 2023 (2002).

²⁷ Id. at 2018.

²⁸ Richard Boldt and Jana Singer, The Maryland/Georgetown Constitutional Law Schmooze: Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts, 65 Md. L. Rev. 82, 96 (2006).

²⁹ Oliver Wendell Holmes, Jr., Address at the Lowell Institute, Boston, Mass. (Nov. 23, 1880).

Judicial Activism – The Future Role of the Judge?

Judicial activism doesn't seem to have a settled definition. Some refer to it as result-oriented opinion making, where they adopt Learned Hand's view that the words a judge must construe are "empty vessels into which he can pour nearly anything he will."³⁰ This supposes that there are no "right" answers in the law just "the resources of legal artifice, the ambiguity of precedents, [and] the range of applicable doctrine" that is so extensive that reasonable judges could disagree without "straining the fabric of legal logic."³¹

However many others prefer to couch their definition of judicial activism in more pejorative terms, usually in reference to times when they believe that a judge has overreached the bounds of their authority and entered the law-making province of the legislature in violation of the separation of powers doctrine. These people point to affirmative acts including legislative redistricting,³² racial balancing in education³³, and the take-over and management of prisons and hospital³⁴ as ways in which judges have expanded their role from the traditional focus on litigation and the negating of unconstitutional governmental acts.³⁵

Whether it is characterized as result-oriented opinion making or judicial activism it has raised concerns at the highest levels in this country. The Senate Judiciary

³⁰ Learned Hand, Spirit of Liberty 81 (1952).

³¹ Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism," 92 Calif. L. Rev. 1441, 1447 (2004).

³² Baker v. Carr, 369 U.S. 186 (1962).

³³ Brown v. Board of Educ., 347 U.S. 483 (1954).

³⁴ Plata v. Schwarzenegger, 2005 WL 2932253 (N.D. Cal. 2005).

³⁵ Robert G. Dixon, *Comments to Chapters 2 and 3*, in The Judiciary in a Democratic Society, 81, 81 (Leonard J. Theberge ed., 1979).

Committee has held several hearings³⁶ to compile information about this proposed problem in hopes of curtailing the trend, though no substantial legislation³⁷ has yet been passed. The main concern surrounding judicial activism is that the judges, who are not elected and often cannot be removed from office without a great deal of effort, are usurping the will of the people as represented by their elected legislators.³⁸

However, this ignores the reality that at times elected representatives will act in their own self-interest when confronted with legislation that is contrary to their personal goals. For example, legislation that would more strictly regulate campaign finance presents quite a conflict of interest for those who wish to protect their advantage in keeping their job.³⁹ Additionally, issues like reapportionment, where voting districts are realigned according to population rather than geographic area, should not be left to the legislature as they have a fundamental conflict of interest in the question.⁴⁰ At these times, strong judicial leadership, even if considered “activist” is needed to protect the rights of the people, even if it is from their own representatives.

³⁶ Judicial Activism - Defining the Problem and its Impact: Hearings on S.J. Res. 26 Before the Subcomm. in the Constitution, Federalism, and Property Rights, 105th Cong. 261 (1997) and Judicial Activism vs. Democracy - What are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcomm. in the Constitution, Federalism, and Property Rights, 108th Cong. 717 (2004)

³⁷ For example, proposed legislation to permit Congress to reverse decisions of the United States Supreme Court as set forth in the Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. (2004) and the Congressional Accountability for Judicial Activism Act of 2005, H.R. 3073, 109th Cong. (2005).

³⁸ Judicial Activism - Defining the Problem and its Impact: Hearings on S.J. Res. 26 Before the Subcomm. in the Constitution, Federalism, and Property Rights, 105th Cong. 261 (1997).

³⁹ Evan Davis, Why Should I Have to Tell Them? The Necessary Role of the Judiciary in Achieving Reform, 69 Alb. L. Rev. 863, 869-870 (2006).

⁴⁰ Id. at 866.

Finally, some type of judicial “activism” is needed where an issue is so charged that many elected leaders prefer not to frustrate their chances of being re-elected by taking a stance that is contrary to the popular view of their constituency or who, for their own personal reasons, will not bow to the courts interpretation of the law. For example, in Brown v Board of Education⁴¹ and its progeny, the United States Supreme Court was forced in to their role as overseer of desegregation because of the unwillingness of the local legislators and jurists in affected districts to comply with their holding on the unconstitutionality of racially segregated education.⁴² Likewise, the courts need to take a strong leadership position when a class of people are being unfairly “locked out” of the political process as it is unlikely that their interests will be adequately represented, if at all, by those who are allowed to vote.⁴³

As much as the idea of judicial activism disturbs some people it is apparent that so long as the law remains the most common means of formalizing public policy, the judiciary will have policy-influencing power. However, any fear about judicial overreaching is unfounded as our judicial leaders are still subject to the checks and balances necessary to the stability of our nation – just about anything the judiciary does can be undone by explicit lawmaking. In conclusion, it should be remembered that a judge must always balance the need for change with preserving that which already

⁴¹ Brown v. Board of Educ., 347 U.S. 483 (1954).

⁴² Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change?, The University of Chicago Press, 1991.

⁴³ Paul Frymer, The Maryland/Georgetown Constitutional Law Schmooze: Distinguishing Formal From Institutional Democracy, 65 Md. L. Rev. 125, 129 (2006).

exists. As Roscoe Pound once espoused, “Law must be stable, yet it cannot stand still. Stability without change is decline; change without stability is anarchy.”⁴⁴

Conclusion

While this paper has focused on judicial leadership exercised from the bench, it is important to remember there are other ways in which judges play a leadership role.

While judges are ethically required to refrain from taking an active part in substantive law-making,⁴⁵ they are the primary resources for determining procedural rules, usually by serving on specialized committees.

Likewise, leading judges are able to shape the future of jurisprudence by taking adjunct positions in law schools and instructing future lawyers. For example, Judge Pennypacker has taught numerous courses over the years in criminal procedure, moot court, and trial practice at Santa Clara University, Stanford University and Lincoln Law School.⁴⁶ As a part-time evening law student I have been tremendously influenced by judges as I have been taught by almost as many judges as tenured law faculty during my matriculation and I am extremely grateful that judges are willing to take on this additional leadership responsibility.

⁴⁴ Roscoe Pound, *Interpretations of Legal History* 17 (1923).

⁴⁵ Judge Pennypacker commented that he is unable to see how California Fifth District Court of Appeals Presiding Justice James Ardaiz was allowed to help write the “Three Strikes and You’re Out Law” as he would be required to interpret it at some point in his tenure on the bench. Interview with Philip H. Pennypacker, Judge, Superior Court of California, County of Santa Clara, in San Jose, Cal. (Apr. 6, 2007).

⁴⁶ *Id.*

APPENDIX:

Transcript of Interview with Judge Philip Pennypacker

April 6, 2007

Santa Clara County Hall of Justice - West Departments

190-200 West Hedding Street, Dept. 44

San Jose, CA 95110

by

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LS - I'd like to start with a little background information. What year did you graduate from law school?

PP - '72, Santa Clara.

LS - Undergraduate?

PP - UC Santa Barbara.

LS - Primarily defense counsel?

PP - in and out of public defenders office three times. Santa Clara County. I was executive director ... I actually have a mini resume. It will be a little bit easier.

LS - What exactly is the nature of your court here, I understand it is domestic violence, what is the name of the actual court?

PP - This is the criminal court at the Hall of Justice and the domestic violence court is three judges within the criminal bench.

LS - I went to the superior courts' website and they specifically mentioned the drug court on Terraine Street but I didn't see a department for domestic violence. Are you a recognized, independent court.

PP - yes and I attend the supervising judge's meetings and do stuff like that.

LS - How long has this been here?

PP - This has been going since the '90s. I can't remember when it exactly got set up but it was in the '90s.

LS - When you were appointed to the bench were you appointed to this court?

PP - to the Superior Court.

LS - just doing regular criminal?

PP - Yep. I did drug court for two years.

LS - that was my initial assignment

PP - Yes, I have only been on the bench since October of 2003. I was confirmed two days after Davis got booted.

LS - So you have probably had a chance to look at the practices outlined in our Leadership Challenges book? I was looking through the principles: Model the Way; Inspire a Shared Vision; Challenge the Process; Enable Others to Act; and Encourage the Heart. Aren't a lot of these areas outside of what a judge is traditionally allowed to do?

PP - This is kind of interesting... by the way I went to college with Barry.

LS - Did you know him?

PP - Yes, we were student leaders together.

LS - that is very interesting. Student government at UCSB.

PP - the process of a and I call them problem solving courts, really adopts all of these practices. It has to be done within the ethical confines of being a judge. And I can give you really clear examples of the ways in which this works because we not only have to collaborate with other partners in the process.

LS - and the partners are?

PP - prosecutors, defense lawyers, probation, community services.

LS - social services, like outside the court system?

PP - Exactly, that feed in to this whole process of problem solving courts and domestic violence area we have the batter-intervention program, the programs that assist mainly women, the shelters, the services provided to everyone in the system and there are many courts doing domestic violence other than criminal courts but we are the focus of it as this is where the really bad cases.

LS - does the judge take a leadership position in coordinating all of this?

PP - Well, I can give you a real clear example of that in the administrative office of courts has produced for example a guidebook to the attorney general's task force examining the domestic violence practices throughout the state. The specific thing is that the administrative office of courts came back was the importance of judicial leadership in this entire area. Which means that we have to, we are the conveners, we call the meetings, we try to push a common, shared set of goals for our court system and we try to innovate as the process goes along and we have innumerable examples of that in domestic violence. Drug court, same type of thinking. It is collaborative with the partners involved, though fewer than in domestic violence. Because basically you

are just dealing with the program providers. Fewer and more narrowly drawn in that area.

LS - because there is no victim.

PP - yes. Judge Manley over there has been the person who is advocating for more funding, advocated for changes in the law.

LS - is that within the ethical bounds of a judge?

PP - when it relates to the process.

LS - can you give me an example?

PP - Sure, Judge Manley was trying to get the law related to Prop 36 changed so that first time offenders on violation of probation and second time offenders would have what is called shock incarceration. That is just very small doses of jail as a consequence as a violation of probation, they wouldn't be kicked out of the program but they would go in to jail.

LS - and the violation would be drug related?

PP - yes, drug related.

LS - if it was another crime.

PP - then that is different. If there is a failure to go to your meetings, something tied strictly to your rehabilitation probation and you are not following through with it ... boom ... you get a couple days in jail. He advocated that law, helped get it through the legislature and it is now on a stay from a judge in Oakland.

LS - on what grounds?

PP - that it is contrary to the intent of the original Prop 36. but he was out in front of that, advocating for that, and he is always advocating for more funds and we are in a real crises at this point because the county has threatened to cut off a lot of the funding for the department of alcohol and drug services and so he is trying to find other sources to get that covered.

LS - so it is primarily the county that funds these programs?

PP - yeah. Our courts now, we are state, we are not associated with the county, we are leaning on the county services to implement a state-mandated program.

LS - can you get money from the state?

PP - yes there is some but not enough. That is the kind of thing that you can ethically do as a judge, you can advocate changes in process, comment on those things that affect the legal process.

LS - I understand that these specialty courts are different because they go from adversarial litigation to basically trying to use the law to help people solve the underlying problems that cause them to get in to trouble in the first place. Can you comment any further on that?

PP - It is very unique because a lot of the judges who are here in the criminal court view us as social workers because we have to have an educational background and we have to keep reading. Luckily when I was in practice I did a lot of that as I had a lot of cases in domestic violence, not so many in drugs, so I had to do a lot of reading before I went over to drug court.

LS - where you practicing before there was a domestic violence court?

PP - No, I tried cases over here.

LS - what I'm getting at, when you were defending a client, before domestic violence courts, did you have leeway to divert them from jail to diversion.

PP - they used to have a diversion program but the OJ Simpson case put an end to that. They repealed the diversion programs for domestic violence programs. There is no diversion for domestic violence.

LS - so how do you deal with it now?

PP - now, there are two basic ways of doing it. There is a 52 week program after they plead guilty, there is a modest amount of jail time that is done upfront and then, you did a great job on this outline as that part about coercive that is really the key behind both drug court and domestic violence court.

LS - you just said this is after the plead guilty, so they go through the regular criminal process?

PP - Yes and we have, every week, I have just a huge calendar: pre-trial conferences, felony pleas, etc., and I send cases out for preliminary hearing and I send cases out for jury trial, so they are getting adjudicated. So we don't collaborate to that extent, but a lot of the collaboration is done to the extent that there is kind of [form?] to what we do

with cases and there is an understanding that on the first offense if nothing is very bad or aggravated the person will get a misdemeanor, 20 days in county jail and weekend work and they will go to the 52 week program and we monitor them, the court has reviews.

LS - is it voluntary?

PP - oh, no, they have to come here and bring us paper work we read it, tell them how they are doing and give them either a "way to go" or a "you better start focusing buddy" lecture.

LS - let me back up to make sure I have the process clear. Some is arrested on a domestic violence charge, it is assigned to you, you do a pre-conference, and then to adjudicate guilt or innocence they go to another judge?

PP - oh, no, I settle about 95% of the cases coming through here.

LS - you do, not the DA?

PP - Oh yes, DA, public defender and I. This afternoon, for example, I had the arraignment calendar, usually in-custody pro-per arraignments and, no lawyers, and we have arraignment speech that outlines everything about their legal rights and the consequences if they plead guilty the whole 9 yards and then if they decide to change their plea or enter a plea here like today, this afternoon I took about 5 or 6 pleas this afternoon.

LS - guilty pleas?

PP - yes and put people in to programs, they are out of custody, they have some time to get their things together and they start their weekender work in the middle of May. Then they go in to the program, have to have proof of enrollment by the end of the month, they come back and show us that and if they don't then we issue no-bail bench warrants and we scoop them up and they come back in and we go "okay, going to do it now?", "yeah, yeah, yeah" and they go back out and if they get two of those they go to the violation of probation calendar and they whacked,

LS - how do they get "whacked" they haven't been convicted..

PP - oh, no, they are convicted at this point as they pled back during the arraignment calendar. No if they plead not guilty, then we have pre-trial conferences every Tuesday and Thursday for MDs, we have Wednesday and Fridays for the Felonies and jury trial calendar Monday morning.

LS - so you try the cases too?

PP - I give them what is called a "shake down" and if they are going to settle they will settle here on the day of jury trial. If they don't settle I send them out and they go to one of the other two departments for trial. When I do a "shake down" it is called a pre-trial conference I've got both sides in here and we go back and forth and see what it takes to settle the case, we get together and we talk about it.

LS - What are some of the reasons why they don't want to settle?

PP - Well, the 52 week program is a big hang-up.

LS - do they have to pay for it themselves?

PP - oh, yeah, \$25 per week usually. Secondly, some of the injuries are not easily provable, thirdly victims will go sideways, they will not want to testify. So those are some of the issues that come up.

LS - Can a wife in a domestic violence situation be compelled to testify against her husband?

PP - not... there is no privilege. The privilege doesn't apply to domestic violence, but on a misdemeanor she can be offered immunity but she cannot be forced to accept it and testify, there is no consequence. On a felony, yes, I can hold them in custody and I have, which isn't fair, but I've done it before because it is just revictimizing them.

LS - Once they go through the program, what is the recidivism rate?

PP - That we are working on right now actually.

LS - but it is better than going through regular criminal process?

PP - absolutely, that doesn't do any good. The real source of this, there is a retired judge up in Alameda County, Peggy Hora, I don't know if you can get a hold of her but she really was one of the first people to start drug court. She is amazing. She teaches at the Judge's Court. She started off in the Muni Court in Hayward.

LS - Yes, she started out in Legal Aid.

PP - Right and she started hearing misdemeanor under the influence of drug cases and her statement at Judge's College is fabulous, she was sitting there and she kept giving people 90 days, minimum-mandatory on under the influence, and in six months, by golly, they were back. She started thinking about exactly what goes on with addiction,

about really trying to get to the core problem and then working with that in a fashion that solves somebody's issues to the extent that a legal problem solving court can do and it will put them on a better path for success.

LS - now the traditional role of the judge has been someone who doesn't get involved.

PP - balls and strikes.

LS - Is there anything in the ethics requiring you to remain detached?

PP - No.

LS - It's just tradition?

PP - Yes, it is tradition and you find that there are a lot of retired judges, a lot of judges that just don't want to get their hands dirty and don't want to go near this and that is fine, because there is a lot of us that think is that what we should be here for, in part, I tried over 130 jury trials, I'm not too afraid of litigation, but what I have seen in drug court and here is that there are causes of crime, one, these courts are designed to get at those causes and try to treat them one person at a time and three, unless we do something radically different in court it is just going to be a continuum of issues. And I think you see it more in domestic violence than you do in drug court.

LS - this almost one to one mentorship is very useful in the drug context and the domestic violence context what would you think if they started extending it to other types?

PP - Well, they have the mental health courts. Judge Chatman has, she would be a good person for you to talk to, she is great and her phone number is 808-7240.

LS - what do the mental health courts do? Is it when they are arrested and you find out that they have mental problems?

PP - Yes, but it is also geared to this. Sometimes it isn't readily apparent to even the most sensitive attorneys that there are issues. If you give someone a page full of probation conditions and you have ADD, you are bi-polar, or dual diagnosed, whatever, it isn't worth the paper it is written on. These courts are designed to be almost a safety net, they don't want to overwhelm people to the point where the anxiety chews them up and they can't perform so many orders of probation are granted that are just setting the defendant up for failure. If you have a mental health issue that is precluding that possibility then the mental health court comes in with more services, monitoring the medical, getting the assistance of social workers or other people that will move the person towards a success mode.

LS - do you think problem solving is paramount for judicial leadership?

PP - No, not paramount. There are other kind of avenues that are there. Some of the best judges that we have had probably never go near a problem solving court. I can think of two or three of them on a state-wide basis that would never go near a problem solving court. They have just experienced and done things in an administrative capacity or intellectual capacity that so separates them from the rest of us that they will always be looked on as leaders in jurisprudence and they have enough people skills that people will go along with them.

LS - Are these people leaders for other judges or leaders that the community can look up to?

PP - That's a great question. They are leaders who are judges, clearly. And it is our insularity that has precluded them from being singled out in the public domain.

LS - Because they are not allowed to comment on these...?

PP - Well, yeah and you know and the layperson don't really care about judges except if it affects them.

LS - I have heard you talking with Judge Hyman about all your committees. Does your resume have

PP - no it doesn't have all the court ones.

LS - What do you do to foster your leadership abilities with these committees?

PP - Well, I think the one way that you can exercise leadership is if you are on a committee is to be organized enough and willing to volunteer on maybe something that is innovative and make it work. But that is the kind of thing and people will go, "Ah, he gets stuff done."

LS - do you get stuff done?

PP - I think most of the time I do, there are other committees, procedure committees, for example when I first got on the bench, Judge Chapman said, look, we have this public outreach thing and I want you to do it. OK, I'm not doing as much as what I was doing in private practice, so what is it? It is this academy and what it is is an outreach to get community based organization leaders in and an educational program that goes for 20 weeks where I run it, have a co chair now, and we teach the entire court process, what superior court is about, so these organizations become sort of ambassadors and

they know faces and can id faces with problem areas and they get two huge binders full of material. We meet every Thursday night. We graduated 25 of them on March 17.

LS - what sort of organizations?

PP - Well, we have the DAs office, some of our own court employees, we have a number of reps from Next Door, Community Solutions, [MACSA??], Asian-American, we have had the Filipino-American community. A lot of these organizations that are community based and they send a rep to us and we take them through this whole process, it is three hours, 20 hours a week and it is very intensive.

LS - so the lay person can understand the legal process.

PP - Absolutely. What the courts can do and can't do. How to get information about the courts, we have the self-service center on the web. We lay everything out and it has all the deadlines.

LS - You obviously have a very busy schedule. Why do you teach?

PP - for one thing I love it. I just like intellectual challenge. Every year, for example getting this course together, I have to go back and re-read cases, get new cases and it helps me stay up with what is going on and it is an intellectual challenge going through that, that's one. Two, I really love the students, that makes it easier, I have had some great students at Santa Clara. I started teaching there about 82 or 83.

LS - Did you say that Judge Hyman was one of your students?

PP - Yeah at one point. And then, he was in a fill in position when I was subbing in for Judge Chapman who used to teach what you are taking now.

LS - so the post-conviction procedures class has been going on for a while?

PP - Right.

LS - I have to tell you I have really been wanting to take this course for awhile.

PP - I really enjoy the students. I taught there until 19, it was six years, so it was 1990 and I was in private practice then and I just couldn't do both, there was no way. I taught three classes, Advanced Criminal Procedure, Basic Criminal Procedure, then this one and I would alternate them wherever they needed me.

LS - one class a semester?

PP – usually one a year. The other reason why I have really enjoyed teaching is it is always a challenge to be able to take something that is written and try to communicate it in an understandable form. To me that was really important when I was trying cases. I taught when I was head of the Conflicts Program which was the court-appointed program in the Sixth District Appellate Project. So I was teaching then. I could do administrative work and teach, then I went out in to private practice in 88 and I think it helped my ability to communicate better through teaching. You just have to learn to condense stuff and clarify it.

LS – Does your wife miss you not being home at nights?

PP – Its not really a problem as she is a director for our superior court so she works from 7 to 7 anyways. And she knows that I like doing it anyways.

LS – Do you feel that you are influencing the next generation of lawyers?

PP – Yeah, and the funny thing was is that when I was teaching in the 80s some of the people went to the public defenders office, I hired actually one of the people in there as a law clerk than as an associate. He also happened to be a family friend and he is now out in private practice. And a lot of people became prosecutors when I was a defense lawyer teaching the class. I always remember asking Judge Ward, who went to Harvard, and having had this experience of having the people go through a defense lawyer educate prosecutors and what did I do wrong? So I asked Judge Ware, so at Harvard did you have Dershowitz and he goes yeah why do you think I became a US attorney.

LS – Do you just teach at SCU or at any other places?

PP – I was suppose to teach over at Lincoln in moot court and it just never gelled, but I teach at Stanford trial practice institute that they have up there and at the judge's college. The last two years I was a seminar leader at the judge's college. And we still have educational responsibilities and I'm there the entire two weeks.

LS – do you specialize in domestic violence?

PP – no, but that is one of the blocks that we had to teach.

LS – Let me look at my outline to make sure I've hit all the points I wanted to.

PP – you know one of the things I have to tell you in terms of each one of these problem solving courts whether it is either been the culture we always have kind of like not goals but objectives for our courts.

LS - can you give me an example?

PP - Yeah, domestic violence court has, the way I have pictured it, has three. Guarantee family and public safety. Two, to get the batterer in to a program, and complete it and learn from it and thirdly it is to punish the people that require punishment. And we keep those in mind when doing things and try to do them as thoroughly and as impartially as we can.

LS - the people that are in there court, the DAs, the public defenders, do they also internalize these goals?

PP - I think they do.

LS - they don't go, I'm in domestic violence court, I want to get out of here?

PP - It certainly is not a favorite place to come nor is it one that is looked on with much favor in either of the offices.

LS - I think it's because when people go in to the prosecutor's office they want to get the bad guys. They don't want to think about the social implications behind it.

PP - yeah, but I think the ones that do end up over here are absolutely superb, both from the DAs office and from the public defender office, they really do just an excellent job. The DAs office, and we are starting to get more and more of this, which I really appreciate, DV, in large part, as far as I'm concerned, is an environmental thing, you see it as a kid and start getting used to handling anxiety and frustrations by violence. And I think you can have a really huge impact by concentrating on the results to the children. I'm on three or four domestic violence committees and I'm on the County domestic violence Council and we are talking about getting it from the kids side and seeing what happened and how that affects and the lack of services, mental health services for children that are exposed to it.

LS - So the domestic violence court has been in existence for about 17 years, so not quite a generation has grown up with it. Have you noticed a trend of domestic violence going down?

PP - for both the county and the nation it is going down and I think a lot of it is due to the fact that we have programs, the programs are working and the people that run them are great and I think judges played a part in that as we end up being probation officers in a sense because we keep reviewing people. We do that in drug court, we bring them back every couple months or a month if they are doing poorly, "What is going on?" We have to have a report from the program, we get probation officer notes, we get all kinds of information because in both drugs and violence areas they are going

to lie to you. A lot of them and they just do. There is a denial aspect in both of them. Blaming somebody else aspect in both of them and there are always excuses. Part of the duties we have as judges is to take those things away so they can't blame anyone and focus on themselves.

LS - One of the judges that was part of the Fordham University panel said that a big part of being a specialty court judge is getting education so that you know when someone says they tested positive for heroin because they had poppy seeds on their bagels the judge can come back and say, well poppy seeds in the US are sterilized so try another one.

PP - I had someone tell me they were recreationally using heroin. And I looked at him and said you know you are the first person who has told me they are a weekend user of heroin.

LS - I don't want to take up much more of your time but I'd like to get to the judicial activism part. Going back to when I was a kid, I always thought judges are so wise, how do injustices keep happening? Once I got to law school I found it was because judges have to follow the law for good or for bad. What do you think of what is termed result-oriented decision making? Where they decide in advance what they will rule and then fashion the law to back up that decision? Because, basically in the law you can make an argument for just about anything.

PP - And that is part of the problem with, not so much activism, as it is result oriented decision making.

LS - you don't equate activism with that? What do you think judicial activism is?

PP - Well, I don't know what activism is at all.

LS - do you believe it exists?

PP - basically the people that use that phrase, it depends whose ox is getting gored and it is as if the 9th Circuit says "in God we trust, one nation under God" had to go that is viewed as activism, and I don't view it as activism. I don't view judges deciding cases on a preordained set one way or another as activism.

LS - some might say that judicial activism is anytime you break off from the traditional path.

PP - I would view it more in terms of going the really negative judicial activism would be violating the canons and going beyond what you are allowed to do and I would view that as negative judicial activism.

LS – the Senators in the Subcommittee report on Judicial Activism, the bee in their bonnet is that they feel that judges are usurping the role of the legislators who are elected and can be held accountable. By appointing special masters or orders that prison systems be taken over. Do you think the subcommittee is right or do you believe it is still within the ethical purview of what a judge is allowed to do.

PP – I guess the classic would be Judge Henderson up in San Francisco. He has taken over the prison system in CA, the medical end of it because people were dying it was just an abomination. There is something called violation of civil rights under 1983 of the US Code Title 28 and if it falls below it and someone files a lawsuit and the judge has to react to that.

LS – so there was a lawsuit for this, it wasn't sua sponte.

PP – judges don't have the power to sua sponte do anything, really. We have power to react if we are seeing something that is wrong or improper or a violation of human rights. The funny part is that judges think about these things all the time. At the judges college, we have Justice Gilbert from Ventura, the second district court of appeals, teaches a class on judicial philosophy to get you thinking about the kind of judge you want to be and where you are going in your career. In his class there is a hypothetical of an actual case out of New York where the person, they had law there, that only the designated beneficiary of a will could inherit and the upshot was the son killed the dad. What do you do in that situation?

LS – I believe I read that in Wills & Trusts, they created a new law to say that if you are the cause of the death you can't inherit.

PP – but the legislature did that, right. And that was the funny part as he had a wide ranging discussion....

LS – of what a judge should do in that situation?

PP – What are you going to do? Are you going to intervene?

LS – Yes, that is the question, because you know it will result in an unfair result.

PP – yes a bad result. At judges college we talked about some of the concerns and he was playing Socratic professor wandering among us and it was really a lot of fun just to have that discussion because it gets you thinking about where you want to go.

LS – did he use that discussion to point you in the direction of how you should act?

PP – No. Good teachers don't do that. Good teachers get you thinking about how far you will go as a judge to connect the dots to make sure the bad thing doesn't happen. Something that is inequitable. No necessarily popular or unpopular, but you want the right outcome to come out.

LS – one of the articles I was reading for my paper was looking at job satisfaction and it found judges on the specialty courts were more satisfied in their work as they can get things done and see results.

PP – And with this review process that we have with people coming in you actually get to see people change for the better. And that is something that is really fantastic. I have people go through the 52 week program and not miss one class. I couldn't do that, I know there would be something screwy where I couldn't make one class. And I have people going through every week that don't miss a class.

LS – do you have the thing they do in drug court where at the end of the program you get together and take a picture?

PP – No, we don't go that far. Abstaining from the use of violence is what they are suppose to do.

LS – I think we have covered all the points. Is there anything you want to add on the subject of judicial leadership?

PP – The specialty courts in many respects has to use these five elements to set a proper tone for the court and it really you have to let people know at the beginning at the front end, I'm talking about the defendants coming in, what the right way of going through this court is and there is a lot of theater with it. In drug court for example I would pick out somebody who is going to get their probation revoked in front of a huge number of people and pull them up, call their case first, and ask "where is your list?" "Uhm, dog ate it" "I see you have tested positive five times in the last five weeks. Are you trying to increase your meetings, are you going to more meetings, are you going to a more intensive outpatient program?" "No, I don't need that" "You're remanded" there are those kind of things where you can put people in a position to show everybody else that this isn't going to be tolerated.

LS – as an example?

PP – Yes. I think it is really important in domestic violence court to be really polite and treat people equally regardless of who they are and set a tone that is more civil than probably most other courts because that is the way I want them to treat who they were battering. So those things are really important and I'm probably an easier touch over here because I do want to enable others to act. For me and for the court what I'm trying

to do is to get them to act to change their lives and so I'm going to give them that opportunity. But you better take it.

LS - That's great. I appreciate you taking the time to talk to me.

PP - Sure. So, we can't raise funds, that's one. And we can lobby in certain situations for some substantive changes. For example, there is a justice on the court of appeals, over on the fifth district, Ardeiz, who helped write the Three Strikes Law. I don't know how he got away with it.

LS - that's abnormal?

PP - I thought it was. Number one I don't know if it is ethical or not. Apparently some people set it was. Number two, then having to turn around and rule on a law you helped to write?

LS - what about the situation where a person is part of the legislature, gets a law passed, then becomes a judge? Do they recuse themselves?

PP - I would think that you would almost have to tell... we have a duty to inform or duty to recuse and it all depends on how you feel about it. I think, at bare minimum, you have to tell them about it. For example, this morning, I had a guy come in and say this is going on and I'll show you the statement of my investigator and I saw the stationary and I thought it looked familiar and it was my old investigator, the one I used to use when I was in private practice. I had to tell the DA right away, I just want to tell you that used to be my private investigator, I used him on about 90% of my cases. So I think you have to disclose.

LS - then it is up to the parties to ask you to recuse yourself.

PP - you can be disqualified. Recusing is to point where you cannot, there is mandatory recusal where you have a business investment over \$5k or related to someone.

LS - well, thank you for speaking to me.

PP - I hope that helped.