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Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings

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BEYOND BALLS AND STRIKES: TOWARDS A PROBLEM-SOLVING ETHIC IN FORECLOSURE PROCEEDINGS

Raymond H. Brescia[†]

ABSTRACT

Courts across the country are being saddled with a rapid escalation of foreclosure filings due to the fallout from the subprime mortgage crisis. Millions of homeowners stand to lose their homes in the United States in the next year, and hundreds of billions of dollars in home equity will be lost as a result by all homeowners, not just those in default on their mortgages. This Article assesses the impact of this wave of foreclosures on communities and the courts, and suggests that jurisdictions should adopt the techniques of those problem-solving courts already in existence: i.e., drug courts, mental health courts, community courts, and domestic violence courts. These techniques involve active judges in non-traditional roles engaging in systemic reform and close monitoring of litigant conduct while utilizing non-adversarial approaches and enlisting the assistance of interdisciplinary stakeholders. Such techniques are well suited to the foreclosure context, particularly given the nature and scope of the subprime mortgage crisis, and court systems should consider creating specialized foreclosure courts that can adopt a problem-solving approach to address the rapid rise in foreclosure proceedings.

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[A]nd I will remember that it's my job to call balls and strikes, and not to pitch or bat.

— Chief Judge John G. Roberts, Jr.¹

In the wake of the subprime mortgage crisis, judges handling foreclosure proceedings are being asked to do more than “call balls and strikes.” The fallout from this crisis is a growing challenge to the courts that must handle the influx of foreclosure proceedings that has followed the collapse of the housing market in the United States. It is predicted that over eight million American homeowners will be in foreclosure over the next four years,² and hundreds of billions of dollars in home values will be drained away from all homeowners due to the looming foreclosure fallout. When homes go into mortgage foreclosure, everyone loses: the entity that holds the mortgage, the borrower, neighbors, the courts, and the local and state governments that lose substantial tax revenue and must cope with devalued and even abandoned properties. Across the nation, states are adopting legislative reforms that will make the foreclosure process more effective in bringing parties together to reach optimal resolutions of these mortgage defaults, and courts are adopting new protocols to deal with the spike in foreclosure proceedings darkening their dockets.

In a previous article, I introduced the idea that court systems should create specialized courts to address the fallout from the subprime mortgage crisis; by using a so-called “problem-solving approach” to the rise in foreclosures that has followed the subprime crisis, I argued, courts could deal more effectively and efficiently with the impact of this crisis on individual litigants, banks, markets, and communities.³ The present Article is an attempt to extend that analysis and assess efforts already underway that are, either intentionally or unintentionally, consistent with the principles of problem-solving jurisprudence.

In many ways, these efforts are attempts to modify how courts deal with foreclosure proceedings by addressing some of the features of the subprime mortgage crisis that have become barriers to effective judicial resolution of mortgage disputes. These barriers threaten to

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

² See CREDIT SUISSE, FORECLOSURE UPDATE: OVER 8 MILLION FORECLOSURES EXPECTED (2008) (December 4, 2008 report from Credit Suisse’s Fixed Income Research).

³ Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 56 CLEV. ST. L. REV. 271, 308–11 (2008).

deepen the impacts of the crisis on the communities where these foreclosures are taking place. Since the worst of the subprime fallout has yet to hit the courts, I argue here that innovative modifications to the foreclosure process, undertaken in several jurisdictions to date and informed by problem-solving principles, are necessary to deal effectively with this crisis—to mitigate some of the consequences that are likely to befall homeowners, the courts, and communities if aggressive interventions are not adopted more broadly. I also argue that the consolidation of these approaches, to be carried out by specialized courts, will enable these courts to marshal the resources and focus the problem-solving approaches that have been introduced in an effort to make them as effective as possible.

In Part I of this Article, I will briefly review the literature on problem-solving courts, focusing on their history, key features, and principles. In Part II, I will review the state of the subprime mortgage crisis, paying particular attention to its relation to foreclosures and the manner in which courts handle those foreclosures. I will lay out the aspects of the crisis that lend themselves to resolution through problem-solving approaches. In Part III, I will provide an analysis of efforts in several state legislatures to modify their foreclosure procedures, and describe the manner in which courts in several jurisdictions are calibrating their protocols for handling foreclosure proceedings so that they might deal more effectively with these disputes and the influx of cases these courts face. I will assess these efforts, with the principles of problem-solving courts in mind, to determine the extent to which such principles can inform an effective and responsive approach to the subprime mortgage crisis. In Part IV, I will attempt to suggest ways in which these problem-solving features can be utilized effectively so that courts can address the fallout from the subprime mortgage crisis aggressively and comprehensively.

I. THE PROBLEM-SOLVING APPROACH

A. Definitions: Problem-Solving Courts and Therapeutic Justice

Any discussion of problem-solving courts will inevitably lead to a discussion of the concept of therapeutic justice. These are not identical concepts, however.⁴ First, although they may take many

⁴ Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1063 (2003). Susan Daicoff has described problem-solving approaches and therapeutic jurisprudence as elements of a larger movement she refers to as the “Comprehensive Law Movement,” which “takes an explicitly comprehensive, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering.”

different forms, problem-solving courts can be defined in their relation to more traditional courts as follows:

Viewed in the aggregate . . . it is possible to identify several common elements that distinguish problem-solving courts from the way in which cases are typically handled in today's state courts. Problem-solving courts use their authority to forge new responses to chronic social, human, and legal problems—including problems like family dysfunction, addiction, delinquency, and domestic violence—that have proven resistant to conventional solutions. They seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to changing the future behavior of litigants and ensuring the future well-being of communities. And they attempt to fix broken systems, making courts (and their partners) more accountable and responsive to their primary customers—the citizens who use courts every day, either as victims, jurors, witnesses, litigants, or defendants.⁵

On the other hand, therapeutic jurisprudence is sometimes viewed as the theory behind what judges in problem-solving courts do,⁶ and has been described as follows:

Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement,"* 6 PEPP. DISP. RESOL. L.J. 1, 1 (2006). Professor Daicoff goes on to observe that the "Comprehensive Law Movement":

is the result of a synthesis of a number of new disciplines within law and legal practice that have been rapidly gaining visibility, acceptance, and popularity These disciplines represent a number of emerging, new, or alternative forms of law practice, dispute resolution, and criminal justice. The converging main "vectors" of this movement are (1) collaborative law, (2) creative problem solving, (3) holistic justice, (4) preventive law, (5) problem solving courts, (6) procedural justice, (7) restorative justice, (8) therapeutic jurisprudence, and (9) transformative mediation.

Id. at 1–2 (footnotes omitted).

⁵ Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 125–26 (2001).

⁶ According to one commentator:

Specialized courts . . . grew into a movement without an underlying legal theory to justify and guide, for example, the relaxation of the adversarial process. The lack of a jurisprudential base left drug treatment and similar courts open to criticism over their status and without an effective response beyond pragmatism. Therapeutic jurisprudence has been put forward to fill this void by serving as the legal theory for drug treatment and similar courts, as well as the rationale for why unified family courts should be created.

David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and*

An interdisciplinary approach to legal scholarship that has a reform agenda, therapeutic jurisprudence seeks to assess the therapeutic and counter-therapeutic consequences of the law and how it is applied, as well as to increase the former and diminish the latter. It is an approach to the law that uses the tools of the behavioral sciences to assess the law's therapeutic effects and, when consistent with other important legal values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional wellbeing of the individuals affected.⁷

While it may be easy to conflate the two,⁸ not all problem-solving courts practice therapeutic justice all of the time, and problem-solving judges are not the only judges that can utilize principles of therapeutic justice.⁹

In the end, although judges in problem-solving courts may adopt principles of therapeutic justice and "the use of social science to study the extent to which a legal rule or practice promotes the psychological

Do Specialized Courts Imply Specialist Judges?, CT. REV., Vol. 37, Issue 1, Spring 2000, at 22, 23 (footnotes omitted); see also Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence*, 82 JUDICATURE 8, 10 (1998) (describing therapeutic jurisprudence and the drug court movement as "natural companions" that developed "simultaneously but independently").

⁷ Bruce J. Winick & David B. Wexler, *Therapeutic Jurisprudence*, in PRINCIPLES OF ADDICTION MEDICINE 550, 550 (Allan W. Graham et al. eds., 3d ed. 2003).

⁸ Indeed, as the sources for this Article reveal, many commentators on these subjects at times tread unsteadily between theorizing about problem-solving courts and therapeutic jurisprudence, a weakness of which, admittedly, I am also guilty.

⁹ An example of this debate can be found in Greg Berman's response to James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2003). Berman states that Nolan fails to recognize the differences between therapeutic jurisprudence and problem-solving courts, and describes the interplay between these two concepts, in part, as follows:

Problem-solving courts are, of course, concerned with rehabilitation, and they do, in fact, rely on therapeutic interventions to change the behavior of offenders. But this represents just part of their work. Much of what problem-solving courts do has no explicit therapeutic dimension. When community courts sentence low-level offenders to perform community service, it is not because they are trying to "heal" the offenders, but because they want to pay back the local neighborhood that has been harmed by crime. When domestic violence courts require batterers to return to court for judicial monitoring of their compliance with orders of protection, it isn't with any therapeutic intent, but to try to make sure they don't continue to abuse their partners.

Greg Berman, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 41 AM. CRIM. L. REV. 1313, 1315 (2004); see also Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517 n.11 (2003) (cautioning against "equat[ing] drug court models to other 'problem-solving' models, since the problems to be solved may be different and the methods chosen to solve them may not be the same").

and physical well-being of the people it affects,”¹⁰ it is more likely that a discussion of the adaptability of the problem-solving model to the foreclosure context will not focus on what psychological forces might be at work in the mortgage context. Instead, I will focus on the types of external issues (as opposed to internal, psychological ones) that problem-solving courts, as such, are typically designed to address: the impact of the subprime crisis on litigants and the communities in which they live, community perceptions of the legitimacy of the courts and court processes, and the inclusion of interdisciplinary stakeholders in resolving the crisis.

B. A Brief History of Problem-Solving Courts

Many trace the origins of problem-solving courts to the creation of the juvenile court in Chicago in 1899, where judges deemphasized criminal punishment in order to promote rehabilitation of the court’s juvenile defendants.¹¹ The first modern problem-solving court was a drug treatment court founded in Miami in 1989.¹² These courts now include “criminal cases involving individuals with drug or alcoholism problems, mental health problems, or problems of family and domestic violence.”¹³

A number of critical social forces have brought about the proliferation of problem-solving courts. The driving forces behind the creation of problem-solving courts in the criminal context in the late 1980s were the explosion in drug prosecutions and the rising incarceration rates that gave rise to frustration with the criminal justice system and its ability to handle dockets that had gotten out of control.¹⁴ Courts, prosecutors and defense attorneys, victims, and the broader community were all discouraged by the revolving door nature of the criminal justice system in the United States that had proven ineffective in addressing rising crime.¹⁵ Key features of the system included: repeat prosecutions of defendants for low-level offenses that were the products of drug dependency and/or a mental illness; quick processing of defendants through a criminal justice system

¹⁰ Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 763, 767 (David B. Wexler & Bruce J. Winick eds., 1996) (emphasis omitted).

¹¹ Winick, *supra* note 4, at 1056.

¹² *Id.*; see also John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 19, 23 (W. Clinton Terry ed., 1999).

¹³ Winick, *supra* note 4, at 1055–56; see also Berman & Feinblatt, *supra* note 6, at 126–27.

¹⁴ Goldkamp, *supra* note 12, 20–24.

¹⁵ Winick, *supra* note 4, at 1056–57.

staggering under the weight of too many cases, which resulted in the release of many defendants to the streets with every expectation that they would soon be back in court; a rise in “law and order” policies that produced overcrowded prisons and rising expenditures for the creation of new ones, with no concurrent reductions in crime rates; and court systems overburdened with growing dockets and unable to marshal resources to respond to those dockets.¹⁶ The explosive growth in the criminal justice apparatus did not seem to result in less crime, only more costs.

A call for creative responses to this rise in crime and the financial and societal costs associated with it came from many sectors, and was spurred by other developments: research indicating that therapeutic responses to some causes of criminal conduct might prove successful in addressing those underlying conditions; a growing frustration with the criminal court system and its apparent lack of consideration for the impact of its actions on society; concerns about the ability of traditional institutions to address these problems; and greater demands for accountability in public institutions generally, including the courts, correctional systems, and law enforcement.¹⁷

Problem-solving courts were seen as a new approach to the rising tide of criminal cases, one that would address the underlying causes of the criminal conduct that brought litigants and victims to the courtrooms in the first place. Problem-solving courts would attempt to ensure that a defendant, whether he or she was an individual with a drug addiction, psychiatric disability, or other problem, would receive treatment and close judicial monitoring of compliance with that treatment in an effort to address the root causes of the criminal conduct.¹⁸ The hope was that by treating the underlying condition, the criminal behavior would stop, or it could at least be managed better, and defendants would not find themselves in the revolving door of the criminal justice system.¹⁹

Another problem-solving model is the community court, which found its first incarnation in the creation of the Mid-Town

¹⁶ For an overview of the origins of problem-solving courts, see GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 15–30 (2005); Greg Berman & Aubrey Fox, *From the Benches and Trenches: Justice in Red Hook*, 26 JUST. SYS. J. 77 (2005); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 841–43 (2000); John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 281–84 (2000); Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1493 (1999); McCoy, *supra* note 9, at 1517–18.

¹⁷ Goldkamp, *supra* note 12, at 20–24; Winick, *supra* note 4, at 1056.

¹⁸ Winick, *supra* note 4, at 1060–61.

¹⁹ *Id.*

Community Court in Manhattan in 1993.²⁰ Typically, the community court handles a range of civil and criminal cases from a particular community within a larger jurisdiction. Started in Mid-Town Manhattan as a way to address growing community frustration with street-level crimes like muggings, graffiti, and street prostitution, the community court model strives to integrate social service providers, and community members generally, in the administration of justice within a particular community's borders.²¹

The philosophy of problem-solving courts has also spread to the domestic violence setting, in which integrated domestic violence courts handle criminal and civil matters where domestic violence is present. These courts attempt to deal with the full range of cases that can arise in the domestic violence context: criminal prosecutions, matrimonial proceedings, child custody issues, and child support disputes.²² In addition, "mental health courts" handle criminal cases in which the psychiatric disabilities of defendants are determined to be a contributing factor in the defendants' criminal conduct.²³

Problem-solving techniques in these areas are designed to address the underlying causes of the litigants' conduct. The problem-solving approach is a response to the frustration felt by judges, litigants, prosecuting and defense attorneys, and the general public with the traditional institutional methods for dealing with these problems. Bruce Winick sums up the forces at work that gave rise to the problem-solving court movement as follows:

All of these courts grew out of the recognition that traditional judicial approaches have failed, at least in the areas of substance abuse, domestic violence, certain kinds of criminality, child abuse and neglect, and mental illness. These

²⁰ For a description of the creation of the Mid-Town Community Court, see Berman & Feinblatt, *supra* note 6, at 127; Kaye, *supra* note 16, at 1494.

²¹ For a description of community courts generally, see, for example, ERIC LEE, U.S. DEP'T OF JUSTICE, CMTY. JUSTICE SERIES NO. 2, COMMUNITY COURTS: AN EVOLVING MODEL (2000); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 373-75 (2005). For a description of the Red Hook Community Court, another community court like Manhattan's, but located in Brooklyn, NY, see Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573 (2003).

²² For a description of domestic violence courts, see Catherine Shaffer, *Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?*, 27 SEATTLE U. L. REV. 981, 993-97 (2004). For theoretical justifications for an integrated domestic violence court, see Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469 (1998).

²³ For a description of mental health courts, see Shaubin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 93-104 (2007).

are all recycling problems, the reoccurrence of which traditional interventions did not succeed in bringing to a halt. The traditional judicial model addressed the symptoms, but not the underlying problem. The result was that the problem reemerged, constantly necessitating repeated judicial intervention. All these areas involved specialized problems that judges of courts of general jurisdiction lacked expertise in. Moreover, they involved treatment or social service needs that traditional courts lacked the tools to deal with.²⁴

As the following discussion shows, the problem-solving courts, although designed to address different issues and problems, have certain common features.

C. Key Features of Problem-Solving Courts

Problem-solving courts all share certain key features, including: an approach that attempts to address the underlying problems behind criminal and other offending conduct, with a goal of obtaining successful outcomes; a focus on systemic change, informed by the issues and trends that present themselves in the courtroom; a reconceptualized vision for an active judge in a non-traditional role; and the participation of interdisciplinary experts in the problem-solving endeavor. Each of these features is described, in turn, below.

1. Outcomes

Problem-solving courts take into account the impact of their actions on the litigants and the broader community, in an effort to bring about "meaningful results."²⁵ They shape their decisions and interventions in accordance with an assessment of what is likely to bring about optimal results in terms of litigant behavior outside of the courtroom and into the future. Not content with simply meting out punishment and achieving retribution for victims, they attempt to get to the root of the causes of the disputes that courts are there to adjudicate; to this end, they determine what kinds of punishments, rewards, treatment, oversight, and social services interventions can

²⁴ Winick, *supra* note 4, at 1060; *see also* BERMAN & FEINBLATT, *supra* note 16, at 34–35.

²⁵ Judith S. Kaye, Keynote Address at the Eleventh Annual Symposium on Contemporary Urban Challenges: Problem-Solving Courts (Feb. 28, 2002), in 29 FORDHAM URB. L.J. 1925, 1928 (2002).

truly make victims and communities whole and shape litigant conduct in such a way to prevent future transgressions.²⁶

By targeting recurring problems that seem to be the product of behavioral, psychological, or psychiatric difficulties or disorders, and intervening to prevent their reoccurrence, these courts can be seen as applying a public health approach to social and behavioral problems that cause serious individual suffering and deterioration in the quality of community life.²⁷

Whether it is a community court, a domestic violence court, or a mental health court, judges in a problem-solving context seek to craft creative judicial responses to offending conduct that address the root causes of that conduct in the hope that, in the end, the prevalence of such conduct will subside.²⁸

2. Systemic Change

Through aggressive data collection, problem-solving courts gather information on activities in the community in an attempt to monitor trends and assess if there are actions judges can take inside and outside of the courtroom that can bring about tangible benefits to the community.²⁹ Judges may also take part in community education to inform the broader public about the role and functioning of the problem-solving court, making residents familiar with those activities and explaining how they can access the court.³⁰ They also seek to scrutinize government functions outside of the courtroom, assisting social service agencies to review their policies and procedures for handling certain cases in order to better meet a particular community's needs.³¹

²⁶ Winick, *supra* note 4, at 1060.

²⁷ *Id.* at 1061.

²⁸ For a description of the different models of problem-solving courts, see Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 36–49 (2005).

²⁹ James McMillan et al., *The Nexus Between Technology and Problem Solving*, 29 FORDHAM URB. L. J. 1958, 1964–66 (2002) (panelist Robert T. Russell of the Buffalo Drug Treatment Court discussing how problem-solving courts utilize technology to handle the data they receive and produce).

³⁰ See, e.g., Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L. J. 813, 819–21 (2007) (discussing the success of the Red Hook Community Justice Center and attributing it to active community outreach and education).

³¹ Berman & Feinblatt, *supra* note 6, at 131.

3. Active Judges in Non-Traditional Roles

The judges in problem-solving courts are active participants in monitoring litigant conduct to ensure compliance with judicial mandates and avoid recidivism.³² They also take an active role in assessing litigants' propensity for change and ability to conform to the expectations of the court.³³ In combination with the outcome-based and systemic change principles, judges are active in trying to identify trends that lend themselves to a more systemic response from the court, modifying procedural rules and sometimes sidestepping conventions to bring parties in from the outside or to bring parties together who are already inside the courtroom, in the hope of finding creative and lasting solutions to pending disputes.³⁴

Such an active stance also requires the transformation of the approaches of key participants in courtroom activities, including the lawyers on both sides of the dispute.³⁵ They must collaborate with the judge in a less adversarial fashion to craft workable solutions that will bring about the desired change in the conduct of the parties, which sometimes proves an uncomfortable role to fill, particularly in the context of criminal proceedings, where lawyers might see a conflict between zealous advocacy and pursuing relief that might be less beneficial to the client in the short run.³⁶

4. Interdisciplinary Collaboration

Central to most problem-solving courts' outcome-based approaches is the courts' collaboration with a wide range of

³² *Id.*; see also BERMAN & FEINBLATT, *supra* note 16, at 35–38; Winick, *supra* note 4, at 1060. Other benefits also accrue from the problem solving model. See, e.g., Amanda B. Cissner & Michael Rempel, *The State of Drug Court Research: Moving Beyond 'Do They Work?'*, in DOCUMENTING RESULTS: RESEARCH ON PROBLEM-SOLVING JUSTICE 23, 25–29 (Greg Berman, Michael Rempel & Robert V. Wolf eds., 2007) (noting that evaluations of problem solving courts have identified the positive impact on drug use, employment, health care and decreased incarceration costs these courts have); Kelly O'Keefe, *The Brooklyn Mental Health Court: Implementation and Outcomes*, in DOCUMENTING RESULTS, *supra*, at 281, 312–15 (discussing the decreased rates of homelessness, hospitalization, service utilization and drug abuse and increase psychosocial functioning among participants in the Brooklyn Mental Health Court).

³³ See, e.g., Kelly O'Keefe & Michael Rempel, *Evaluation of the Staten Island Treatment Court: Implementation and Documentation*, in DOCUMENTING RESULTS, *supra* note 32, at 75, 77 (outlining the Staten Island Drug Treatment Court "team," which includes "a dedicated judge, project director, senior case manager, senior court clerk, two dedicated assistant district attorneys, two defense attorneys, several dedicated case managers from Treatment Alternatives for Safe Communities (TASC), . . . and a TASC supervisor").

³⁴ See, e.g., *id.* at 76–82 (outlining the operational model of the Staten Island Drug Treatment Court).

³⁵ Berman & Feinblatt, *supra* note 5, at 132.

³⁶ For a discussion of the ethical issues facing lawyers practicing in problem-solving courts, see *infra* notes 46–52 and accompanying text.

disciplines in the adoption of responses to the disputes before them. From social workers to social service providers, welfare agencies to job training programs, tenant associations and block watch groups to law enforcement, problem-solving courts enlist a range of community stakeholders in an effort to deal holistically with the problems such courts are designed to solve.³⁷

D. What (if Anything) is Wrong with the Problem-Solving Approach?

Criticisms of the problem-solving approach fall into several different categories. First, it is argued that the problem-solving approach is costly and the results it produces do not warrant the expenses associated with its maintenance (the “efficacy” problem). Second, critics are concerned that there are not appropriate due process safeguards for litigants involved in problem-solving courts (the “civil liberties” problem). Third, similar to the expense issues raised in the efficacy problem, some critics of expanding the problem-solving approach are concerned resources might be better spent on services designed to exact litigant compliance—like probation and parole departments—rather than trying to force courts to take a more active role in oversight of litigant conduct (the “misdirected resources” problem). The following is a discussion of each of these concerns, in turn. I will return to these themes in Part IV, to assess the extent to which they might be relevant to the creation of problem-solving courts for foreclosure proceedings.

Turning first to the efficacy problem, the reduction in recidivism is one of the central goals of most problem-solving courts in the criminal context. If courts are not effective in doing so, is there any reason to have them?³⁸ Yet it is only twenty years since the creation of the first modern problem-solving court in Dade County, Florida, and there is no oversupply of longitudinal studies regarding the long-term effectiveness of problem-solving courts to review their impact on litigants, victims, and communities over time.³⁹ Those studies that

³⁷ BERMAN & FEINBLATT, *supra* note 16, at 36–37; Berman & Feinblatt, *supra* note 5, at 131–32; Winick, *supra* note 4, at 1061.

³⁸ Judge Bozza of Pennsylvania has succinctly expressed this idea: “[T]he only reason problem-solving courts exist is to respond to persons who have committed crimes, and if they do not significantly reduce recidivism, there is no reason for them to continue.” John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 117 (2007).

³⁹ Various commentators have noted the lack of strong, longitudinal studies to measure the effectiveness of problem-solving courts in their various forms. See, e.g., Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833 (2000) (noting differences in criteria used to assess effectiveness of different courts); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1505 (2003) (describing many studies invoked

do exist tend to produce mixed reviews. Some indicate a clear picture of courts that reduce recidivism, generate compliance with drug and other treatment programs, and improve community perceptions of the legitimacy and effectiveness of the courts—all critical benchmarks for any problem-solving endeavor⁴⁰—while others offer a murkier assessment, and show marginal positive outcomes in the problem-solving context as compared to the results from more traditional courts.⁴¹

Looking beyond the somewhat mixed results on recidivism, there seems to be some agreement that problem-solving courts do yield cost savings in terms of lower incarceration and arrest rates for participants. Alternatives to incarceration and diversion techniques utilized by the drug courts appear to be particularly successful by these metrics.⁴² Furthermore, problem-solving courts can also improve litigant perspectives on the courts themselves⁴³ and improve

by drug court proponents as “flawed, inconclusive or both”); Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 336–37 (noting the failure of studies of problem-solving courts to take into account differences in offender characteristics).

⁴⁰ See, e.g., STEVEN BELENKO, NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 7 (2001), available at <http://www.drugpolicy.org/docUploads/2001drugcourts.pdf> (conducting a literature review of thirty-seven studies of the effectiveness of drug courts and finding “considerable local support” for such efforts and reductions in drug use and recidivism while participants are under court supervision); Denise C. Gottfredson et al., *Effectiveness of Drug Treatment Courts: Evidence from a Randomized Trial*, 2 CRIMINOLOGY & PUB. POL’Y 171, 189–90 (2003) (finding significant reductions in recidivism with drug treatment court participants); see also Steven Belenko, *Research on Drug Courts: A Critical Review*, NAT’L DRUG CT. INST. REV., Vol. I(1), Summer 1998, at 10, 28–29, 37–39, available at <http://www.ndci.org/admin/docs/ndci11.pdf> (conducting a literature review of drug court research and noting consistent findings across studies of a reduction in recidivism for drug court participants during period of court supervision); Steven Belenko, *Research on Drug Courts: A Critical Review 1999 Update*, NAT’L DRUG CT. INST. REV., Vol. II(2), Winter 1999, at 1, available at <http://npcresearch.com/Files/RDC.pdf> (same); MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 5–7 (2000) (noting reduction in crime in the jurisdiction of Manhattan community court and reduction in incarceration rates due to operation of the court as well as a longer time before re-arrest for court participants).

⁴¹ See, e.g., U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 6 (2005), available at <http://www.gao.gov/new.items/d05219.pdf> [hereinafter GAO 2005] (describing evidence of the effectiveness of drug courts as “limited and mixed”); Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1497 (2000) (“[T]he evidence on drug court effectiveness remains breathtakingly weak.”); Shaffer, *supra* note 22, at 995–96 (noting an absence of reliable research on the effectiveness of batterers programs and a presence of “contradictory information about the effectiveness of legal sanctions to stop or reduce domestic violence” (citations omitted)).

⁴² GAO 2005, *supra* note 41, at 73.

⁴³ M. SOMJEN FRAZER, CTR. FOR COURT INNOVATION, THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS: A CASE STUDY AT THE RED HOOK

community perceptions of the effectiveness and legitimacy of the courts as critical resources to help resolve community problems.⁴⁴

These successes—when coupled with the overall likelihood of reduced recidivism shown by courts that have been studied—do seem to establish that there are tangible benefits from the problem-solving approach. Proponents are convinced, and have convinced critical stakeholders, that problem-solving models are worthwhile and can make real and lasting changes in the communities in which they operate. As a result, problem-solving courts are likely here to stay, at a minimum, and are likely to be expanded in the near future.⁴⁵

With respect to the civil liberties problem, since problem-solving approaches often strive to reduce the adversarial nature of court processes, critics raise concerns that these approaches minimize the effectiveness, or even trivialize or trample, due process and other constitutional protections.⁴⁶ Defense attorneys are concerned that the pressure to accept a problem-solving court's jurisdiction over a defendant leaves little time for the full investigation of a defense for the accused because defendants are often required to accept plea deals in order to benefit from the problem-solving court's package of alternative sentencing arrangements that would not otherwise be available.⁴⁷ Similarly, critics are concerned that since active judges are encouraged to communicate directly with the litigants and are exposed to the litigants' psycho-social evaluations and/or the social service provider or mental health screener's assessment of the

COMMUNITY JUSTICE CENTER 14-22 (2006), *available at* http://www.communityjustice.org/_uploads/documents/Procedural_Fairness.pdf (noting "significant, positive impact" of the Red Hook community court on defendant perceptions of fairness of the courts).

⁴⁴ See, e.g., Malkin, *supra* note 21, at 1582-88 (noting community perception of the Red Hook community court as a problem-solving community resource).

⁴⁵ See, e.g., LEE, *supra* note 21, at 7-8 (describing the expansion of the community court model due to apparent successes).

⁴⁶ See, e.g., Nolan, *supra* note 9, at 1562 (criticizing the practice of therapeutic justice in drug courts and, citing one example, noting that "the therapeutic perspective not only justifies random searches of the drug court client's person and home without probable cause; it also allows the court to make judgments regarding persons associated with the drug court client, the result of which may be further judicially sanctioned therapeutic intervention: e.g., parenting and anger management classes").

⁴⁷ See, e.g., Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2003) (discussing challenges facing defense attorneys in problem-solving courts); Judy H. Kluger et al., *Impact of Problem-Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1917-22 (2002) (symposium panelist Susan Hendricks discussed ethical dilemmas facing defense attorneys in the problem-solving setting). While this argument might have some merit, the criticism that defense lawyers in criminal settings might not always have the time they need to investigate their clients' defenses before plea agreement deals are thrust upon them is hardly one that could not be levied against the bind defense attorneys routinely find themselves in *outside* of the problem-solving context.

litigants' receptiveness to social services or treatment interventions, the judge's independence in sentencing and impartiality generally might be impaired.⁴⁸

Yet the defense attorney who strives to ensure that problem-solving courts are accountable and acting under due process constraints, and that she is reflecting and zealously pursuing what is in her client's best interest, is upholding the highest values of the legal profession.⁴⁹ Defense attorneys must be vigilant when—and judges must be sensitive to situations where—judicial independence could be called into question. Indeed, promoting the legitimacy of judicial actions is one of the overt goals of the problem-solving endeavor, and problem-solving courts have proven successful in meeting that goal:

Problem-solving court proceedings are rated more highly than traditional court proceedings on the dimensions of respect, neutrality, voice, and trustworthiness. As the procedural justice perspective would predict, people in a problem-solving court have higher levels of satisfaction with the process and outcomes than in traditional courts. Judges, court staff, treatment and service providers, and lawyers report improved satisfaction with their work.⁵⁰

Given that "consumer satisfaction surveys" indicate that litigants prefer having their cases handled in problem-solving courts, it is safe to assume that these courts are perceived as legitimate and they must function in ways that are consistent with these litigants' lay notions of due process.⁵¹ And, at least with one problem-solving court, this held true even though the sentences given were somewhat more severe than in conventional court settings.⁵²

Finally, the misdirected resources concern about the role of problem-solving courts calls into question the value of the hands-on approach of judges with respect to monitoring litigant compliance

⁴⁸ See, e.g., Lanni, *supra* note 21, at 385 (describing criticisms of community courts).

⁴⁹ For a defense of the role of the defense attorney in the problem-solving setting, see William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595 (2003).

⁵⁰ Casey & Rottman, *supra* note 28, at 51.

⁵¹ FRAZER, *supra* note 43, at 14–19; JOHN S. GOLDKAMP ET AL., U.S. DEP'T OF JUSTICE, CMTY. JUSTICE SERIES NO. 4, DEVELOPING AN EVALUATION PLAN FOR COMMUNITY COURTS: ASSESSING THE HARTFORD COMMUNITY COURT MODEL (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185689.pdf>.

⁵² MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 9 (1997), available at http://www.communitycourts.org/_uploads/documents/DISPE-6Q.PDF.

with court-ordered interventions.⁵³ Leave that job to the professionals, like probation and parole departments, it is argued, for they have expertise in these areas and can perform such tasks more efficiently and effectively than judges.⁵⁴ Judges should not assume the role of “glorified probation officers.”⁵⁵ Such a critique overlooks the added value that the judge brings to the monitoring context, however. Litigants will often respond better to guidance, encouragement, and reprimand when it emanates from the bench as opposed to from other sectors within the criminal or civil justice systems.

E. Bringing the Problem-Solving Ethic to Conventional Courts

Given the apparent benefits of a problem-solving approach to the administration of justice, can courts utilize such an approach in other contexts, beyond the criminal, drug, family, and mental health settings? Are there other subject matter areas that lend themselves to a problem-solving jurisprudence? Can courts use problem-solving principles and methods in other settings to bring about long-term results where traditional methods of adjudicating might prove ineffective or hollow? Are there ways that courts can utilize an ethic of care, while recognizing the concerns of the critics of problem-solving approaches?

The Conference of Chief Justices and the Conference of State Court Administrators, bodies of state court officials from across the United States, convened a “Joint Problem-Solving Courts Committee” to assess the value of problem-solving jurisprudence and determine whether its principles could and should be adopted beyond those contexts where they have been implemented to date. Those organizations issued a joint resolution, in which they agreed to undertake the following:

Encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes while preserving the rule of law, enhancing judicial effectiveness, and meeting the

⁵³ McCoy, *supra* note 9, at 1530–34.

⁵⁴ Another critique asserts that problem-solving approaches should not be limited to specialized courts; rather, the enhanced services at judges’ disposal in problem-solving courts should be available to courts of general jurisdiction. Phyllis Skloot Bamberger, *Specialized Courts: Not a Cure-All*, 30 FORDHAM URB. L.J. 1091 (2003).

⁵⁵ Hoffman, *supra* note 41, at 1440.

needs and expectations of litigants, victims and the community.⁵⁶

These national bodies identified problem-solving “principles and methods” as: “ongoing judicial leadership, integration of treatment services with judicial case processing, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and government organizations.”⁵⁷ They resolved to develop a national agenda that would, in part, “[e]ncourage each state to develop and implement an individual state plan to expand the use of the principles and methods of problem-solving courts into their courts.”⁵⁸

Following this joint resolution, the California Administrative Office of the Courts, together with the Center for Court Innovation, conducted a research project with judges from California and New York who had experience presiding over problem-solving courts. The goal of the study was to assess “the opportunities and barriers to applying problem-solving principles and practices outside of specialized problem-solving courts.”⁵⁹ Focus groups with these judges identified five elements of the problem-solving approach that might prove applicable in more conventional settings. First, judges could be more proactive by “asking more questions, seeking more information about each case, and exploring a greater range of possible solutions.”⁶⁰ Second, judges could increase their direct interaction with litigants; such direct interaction “was deemed a prerequisite for effective behavior modification, enabling the judge to motivate defendants to make progress in treatment, bringing to light the most crucial needs of parties in civil cases, and laying the groundwork for positive solutions.”⁶¹ Third, judges could enhance the extent to which they are engaged in “ongoing judicial supervision” of cases.⁶² Fourth,

⁵⁶ CONFERENCE OF CHIEF JUSTICES AND CONFERENCE OF STATE COURT ADM’RS, RESOLUTION 22: IN SUPPORT OF PROBLEM-SOLVING COURT PRINCIPLES AND METHODS 2 (2004), available at <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf> [hereinafter RESOLUTION 22]. For an overview of the activities of the Conference of Chief Justices/Conference of State Court Administrators Problem-Solving Courts Committee, see Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts into the Mainstream: A Report Card from the CCJ-COSCA Problem-Solving Courts Committee*, CT. REV., Vol. 39, Issue 1, Spring 2002, at 4.

⁵⁷ RESOLUTION 22, *supra* note 56, at 1.

⁵⁸ *Id.* at 2. These principles were reaffirmed in 2004. *Id.* at 3.

⁵⁹ Donald J. Farole et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 58 (2005).

⁶⁰ *Id.* at 62.

⁶¹ *Id.* at 63.

⁶² *Id.* The researchers reported that the judges participating in the focus groups reported that “[r]equiring defendants, particularly probationers, to report back to court for treatment

judges could integrate the assistance of social services into the plans they adopt with litigants.⁶³ Finally, judges could adopt, where appropriate, a “team-based, nonadversarial approach” to judicial resolution of disputes—although this was one principle that met with less consensus than the others.⁶⁴

Apart from the principles that might be adopted in conventional courts, these judges also identified the types of cases that might lend themselves to a problem-solving approach, and these were “characterized in part as those in which the underlying problem can be resolved by court intervention, as well as situations in which a lack of appropriate services contributed to” the conduct at the heart of the dispute.⁶⁵

Given these findings and the history of the creation of problem-solving courts, it is appropriate to review the reasons for the creation of problem-solving courts as they currently exist, and to assess whether the principles of problem-solving courts could be utilized for beneficial results in a particular setting, when determining whether problem-solving principles should be pursued in other contexts. Such an approach will help to determine if traditional judicial interventions will require modification and whether problem-solving principles can result in positive outcomes.

When one reviews the foreclosure crisis unfolding in state courts across the country to determine whether the problem-solving approach might be beneficial in this context, several key questions arise on the potential impact of the adoption of problem-solving principles. First, is there a crisis where court dockets have become difficult to manage and positive outcomes for litigants and the broader community difficult to obtain? Is there a question about the credibility of the justice system and its ability to take into account the impacts of court actions on litigants and the broader community in this context? Would greater involvement of judges and other court personnel, including closer interactions with litigants and greater supervision of the cases, bring about better outcomes? Would the integration of interdisciplinary expertise, including social services interventions, prove beneficial? Would a non-adversarial ethic prove helpful in securing optimal results in foreclosure disputes? The following sections seek to answer these questions, first providing an

updates and judicial interaction was identified as one of the least controversial and most effective practices that could be applied in conventional criminal courts.” *Id.*

⁶³ *Id.* at 64.

⁶⁴ *Id.*

⁶⁵ *Id.* at 65.

overview of some of the features of the subprime crisis that might lend themselves to a problem-solving ethic in judicial dispute resolution and then looking at some problem-solving features state legislatures and courts are adopting in response to the foreclosure crisis.

II. KEY FEATURES OF THE SUBPRIME MORTGAGE CRISIS THAT MAKE THE PROBLEM-SOLVING APPROACH APPROPRIATE IN THE FORECLOSURE CONTEXT

A. Steep Increase in Foreclosure Filings

The sheer volume of, and steep increase in, foreclosure filings in the United States has been staggering, with many more predicted in the coming year. The second quarter of calendar year 2008 alone saw 739,714 new foreclosure filings, a 14 percent increase from the previous quarter, and a 121 percent increase from the same quarter in 2007.⁶⁶ By one estimate, there were over 300,000 new foreclosure filings in the United States in August 2008 alone.⁶⁷ It is also estimated that over 3 million home mortgages went into default in 2007 and 2008, with approximately 2 million Americans losing their homes.⁶⁸ This increase in foreclosure filings has overburdened state courts, straining the ability of these courts to handle this increase. Indeed, foreclosure filings across New York State have reached record levels over the last several years, increasing 150 percent from January 2005 through April 2008,⁶⁹ while courts in Ohio saw a 280 percent increase in foreclosure filings in 2007 as compared to 1997.⁷⁰

⁶⁶ Press Release, RealtyTrac, Foreclosure Activity Up 14 Percent in Second Quarter (July 25, 2008), <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=4891&acct=64847#statetable>.

⁶⁷ Press Release, Realty Trac, Foreclosure Activity Increases 12 Percent in August (Sept. 12, 2008), <http://www.realtytrac.com/ContentManagement/pressrelease.aspx?ChannelID=9&ItemID=5163&acct=64847>.

⁶⁸ *Monetary Policy and the State of the Economy, Part I: Hearing Before the H. Fin. Serv. Comm.*, 110th Cong. 93 (2008) (written testimony of Mark Zandi, Ph.D., Chief Economist and Founder, Moody's Economy.com).

⁶⁹ JUDITH S. KAYE & ANN PFAU, N.Y. STATE UNIFIED COURT SYS., RESIDENTIAL MORTGAGE FORECLOSURES: PROMOTING EARLY COURT INTERVENTION 2 (2008), available at <http://www.courts.state.ny.us/whatsnew/pdf/ResidentialForeclosure6-08.pdf> [hereinafter FORECLOSURE PLAN FOR NEW YORK COURTS].

⁷⁰ Letter from Thomas J. Moyer, Chief Justice, and Steven C. Hollon, Administrative Director (May 2008), in SUPREME COURT OF OHIO, OHIO COURTS SUMMARY 2007, available at <http://www.sconet.state.oh.us/publications/annrep/07OCS/2007OCS.pdf>.

B. Community Impacts of the Subprime Mortgage Crisis and Foreclosures

When a mortgagor is delinquent in his or her mortgage payments and ultimately loses the home to foreclosure, the entire community suffers in myriad ways. First and foremost, not only does the value of that home decrease, but the value of neighboring properties is also diminished. Indeed, recent studies predict a range of losses to homeowners across the country. One predicts a cumulative loss in tax base and home values of \$356 billion, with another predicting a total loss of \$1.2 trillion in home values due to the increase in foreclosures nationally.⁷¹

One study of the impact of foreclosures in the City of Chicago in the late 1990s showed that *each* single-family home foreclosure reduced the value of properties within one-eighth of a mile of that home from between 0.9 and 1.136 percent.⁷² Given this range, each foreclosure had a cumulative impact on the neighboring properties by reducing their values by \$159,000 to \$371,000 per foreclosure.⁷³ That study further estimated that for foreclosures filed in Chicago in 1997 and 1998, property values in the city as a whole dropped from between \$598 million and \$1.39 billion.⁷⁴ In addition to the loss in property values, vacant properties are a magnet for crime, from gang and drug activity to arson and vandalism, and a drain on municipal services, like police and fire departments, as well as on social services departments struggling with the provision of assistance to those rendered homeless by foreclosure.⁷⁵ There are also indirect costs associated with foreclosures:

Indirect costs to municipalities occur mostly through the impact that foreclosures, especially concentrated foreclosures, can have on house price appreciation. Because homes often

⁷¹ PEW CHARITABLE TRUSTS, DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 10 (2008), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Subprime_mortgages/defaulting_on_the_dream.pdf (predicting \$356 billion loss in home values due to rise in foreclosures); GLOBAL INSIGHT, THE MORTGAGE CRISIS: ECONOMIC AND FISCAL IMPLICATIONS FOR METRO AREAS 2 (2007), <http://www.usmayors.org/metroeconomies/1107/report.pdf> (predicting \$1.2 trillion total loss in home values due to the subprime mortgage crisis).

⁷² DAN IMMERGLUCK & GEOFF SMITH, WOODSTOCK INST., THERE GOES THE NEIGHBORHOOD: THE EFFECT OF SINGLE-FAMILY MORTGAGE FORECLOSURES ON PROPERTY VALUES 9 (2005).

⁷³ *Id.* at 11.

⁷⁴ *Id.*

⁷⁵ William C. Apgar et al., *The Municipal Costs of Foreclosures: A Chicago Case Study* 10–11 (Homeownership Pres. Found., Hous. Fin. Policy Research Paper No. 2005-1, 2005), available at http://www.99Shope.org/content/pdf/Apgar_Duda_Study_Full_Version.pdf.

deteriorate and/or become vacant during the foreclosure process, they often become associated with crime and general unsightliness, and act as a deterrent for prospective homebuyers. In addition, the presence of foreclosed properties may encourage existing stable owners to leave the area. Reduced attractiveness of the neighborhood and its associated reduction in the rate of increase of home values translates into slower growth (or potentially a decline) in the municipal property tax base. This same phenomenon may also adversely impact business location decisions as well as reduce the profitability of existing business in the city. This in turn can impact sales and income tax receipts in municipalities where they exist.⁷⁶

One study of the impact of the subprime mortgage crisis in just ten states estimated that those states alone stood to lose a total of \$6.6 billion in tax revenue in 2008.⁷⁷

In addition to the reduction in the tax base associated with the dip in property values for both the foreclosed property and neighboring properties, homeowners delinquent on their mortgages are often behind in their municipal tax payments. And the municipality may never recover 100 percent of the outstanding tax charges because it is costly and time-consuming to foreclose on a tax lien.⁷⁸

In extreme cases, a property may stand vacant and in disrepair for so long, or become fire ravaged due to arson, that the structure becomes unsafe and a municipality must exercise its police powers to seize the property and demolish it at substantial public cost. Indeed, one estimate of the drain on municipal coffers due to such an extreme, disastrous case places the cost to a municipality at over \$34,000 per building, with the average cost to municipalities for *each* foreclosure estimated at \$7,000, whether an extreme case or not.⁷⁹

It also must be noted that in many instances when a particular property owner is delinquent on his or her mortgage, the value of the collateral (i.e., the home) is also reduced as homeowners tend to spend less on upkeep and often fall behind in their real estate taxes, resulting in the placement of tax liens on the property. Moreover, banks must expend considerable time, money and effort to

⁷⁶ *Id.* at 11 (footnote omitted).

⁷⁷ GLOBAL INSIGHT, *supra* note 71, at 5.

⁷⁸ WILLIAM C. APGAR & MARK DUDA, COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 7 (2005), http://www.995hope.org/content/pdf/Apgar_Duda_Study_Short_Version.pdf.

⁷⁹ Apgar et al., *supra* note 75, at 26.

foreclose on the property.⁸⁰ While some of the direct costs, like attorney's fees and court costs, can be subsumed into the foreclosure judgment and taken from any surplus that might exist upon sale of the property, when the auction price of the property is less than the value of the loan, the mortgagee is forced to seek a deficiency judgment against the borrower, and may have difficulty recouping those costs.⁸¹ More and more, banks are realizing "that keeping homeowners in their homes is often the best way to mitigate credit losses, preserve customer relationships, maintain stable neighborhoods, and minimize the detrimental effects vacant properties can have on crime and property values."⁸²

C. Subprime Securitization and Barriers to Communication Between Borrowers and Lenders

The transformation of the mortgage market that occurred in the early part of this decade, when mortgage securitization took hold and mortgages were bundled together and sold as securities, changed the borrower-lender relationship by making meaningful communication between the homeowner and the entity that holds the mortgage extremely difficult. Now, the day-to-day management of a mortgage on the part of the lender is routinely carried out by a servicer, a "middle person" responsible for collecting principal and interest payments and pursuing foreclosure where a borrower is in default. While a detailed description of this process is beyond the scope of this Article, a brief overview of the securitization process is helpful to understand the existence and pervasiveness of substantial barriers to communication between borrowers and lenders—barriers that prove difficult to overcome when a borrower is in default and wishes to communicate with the lender to determine if both parties share an interest in modifying the loan and preserving the relationship.

The explosive growth and calamitous decline of the subprime mortgage market that led to the spike in foreclosure filings was a result of several forces: the strength of the housing market; relatively

⁸⁰ For an overview of the costs to lenders and servicers from the foreclosure process, see MORTGAGE BANKERS ASSOCIATION, *LENDERS' COST OF FORECLOSURE 4-6* (2008), available at <http://www.nga.org/Files/pdf/0805FORECLOSUREMORTGAGE.PDF>.

⁸¹ *Id.*

⁸² COMPTROLLER OF THE CURRENCY, U.S. DEP'T OF THE TREASURY, *FORECLOSURE PREVENTION: IMPROVING CONTACT WITH BORROWERS, INSIGHTS 2* (2007), available at http://www.occ.treas.gov/cdd/Foreclosure_Prevention_Insights.pdf [hereinafter OCC: IMPROVING CONTACT]; see also *id.* at 2-3 (noting lenders should be interested in avoiding foreclosure because of the reputation risk, the cost to lender-owned portfolios, the costs of servicing a foreclosed property, diminished property values, and the impact of rampant foreclosures on Community Reinvestment Act ratings).

low interest rates; deregulation that led to innovations in mortgage products making loans available with less money down and fewer documentation requirements; and a relentless drive to securitize mortgages to generate fees for brokers and loan originators and secure liquid capital to fund more mortgages, with a portion of these loans issued regardless of the viability of the borrowers as worthy credit risks.⁸³ In just two years, from 2003 to 2005, the percentage of subprime loans originated in a given year, as a percentage of all mortgages, increased from nearly 8 percent to 20 percent.⁸⁴ Much of this growth in the subprime market was fueled by securitization, as approximately 75 percent of the \$600 billion of all mortgages originated during this time were packaged and sold through the securitization process.⁸⁵

To date, much attention has been paid to the role that lending to subprime borrowers⁸⁶ and the extension of subprime loans⁸⁷ has had on the current financial crisis. There is a growing recognition that other mortgages, like the so-called “alt-A” loans made to borrowers that might have slight blemishes on their credit histories or have high debt-to-income ratios,⁸⁸ are also starting to default at alarming rates.⁸⁹ This raises the prospect that the mortgage meltdown is likely to impact borrowers and institutions beyond those involved in subprime lending. For these reasons, I will address this review to the role that foreclosure processes can have on stabilizing the mortgage and

⁸³ For an overview of the forces that led to the subprime mortgage meltdown, see *Possible Responses to Rising Mortgage Foreclosures: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 93–111 (2007) (statement of Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp.) [hereinafter *Bair Testimony*]; *Mortgage Market Turmoil: Causes and Consequences: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. (2007) (testimony of Roger T. Cole, Dir., Div. of Banking Supervision and Regulation) [hereinafter *Cole Testimony*]; EDWARD M. GRAMLICH, SUBPRIME MORTGAGES: AMERICA’S LATEST BOOM AND BUST 28 (2007); Brescia, *supra* note 3, at 282–300; Allan N. Krinsman, *Subprime Mortgage Meltdown: How Did It Happen and How Will It End*, J. STRUCTURED FIN., Vol. 13(2), Summer 2007, at 13; Patricia A. McCoy and Elizabeth Renuart, *The Legal Infrastructure of Subprime and Nontraditional Home Mortgages* 20–23 (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. UCC08-5, 2008), available at http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-5_mccoy_renuart.pdf.

⁸⁴ *Bair Testimony*, *supra* note 83, at 96–97 (footnotes omitted).

⁸⁵ *Id.*

⁸⁶ The term “subprime borrower” refers to those “who do not qualify for prime interest rates because they exhibit one or more of the following characteristics: weakened credit histories typically characterized by payment delinquencies, previous charge-offs, judgments, or bankruptcies; low credit scores; high debt-burden ratios; or high loan-to-value ratios.” *Cole Testimony*, *supra* note 83.

⁸⁷ Souphala Chornsengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, 88 FED. RES. BANK OF ST. LOUIS REV. 31, 32 (2006) (highlighting differences between subprime and prime loans).

⁸⁸ *Cole Testimony*, *supra* note 83.

⁸⁹ Vikas Bajaj, *Defaults Rise in Next Level of Mortgages*, N.Y. TIMES, Apr. 10, 2007, at C1.

housing markets as a whole. Generally, state law around foreclosures treats all defaults equally, whether they are related to subprime, alt-A, or prime loans.⁹⁰

One of the key features of the securitization process is the fact that the traditional borrower-lender relationship has been severed, making way for one that is attenuated and complex and leaving little room for communication or mutuality of obligation among the parties.⁹¹ This relationship shift has affected the quality of the mortgages currently outstanding, as more fully described below, and has had a direct impact on the rise in foreclosures over the last two years. This severed relationship is particularly relevant in the foreclosure setting because, at the outset, many bad loans were made that would not have been made if the institutions making the loans had a long-term interest in ensuring the borrowers could pay back those loans.⁹² On the back end, when the borrower begins to fall behind on his or her mortgage payments, it has become increasingly difficult for borrowers to negotiate with their mortgagees in the interest of preserving the relationship and avoiding foreclosure, because there is no real relationship between borrowers in distress and the institutions that currently hold their mortgages. While this second phenomenon is more relevant to any discussion of foreclosures, I will first review the mortgage and securitization process, and the incentives embedded in it, in order to explain some of the causes of the current crisis.

The new mortgage process starts when a borrower has initial contact with a mortgage broker and/or loan originator. Those individuals or entities assess that borrower's ability to obtain a loan, and then connect that borrower to a lending institution. During the expansion of the subprime market, these brokers and originators were less concerned with the borrower's creditworthiness and focused instead on consummating a mortgage deal and then transferring that mortgage agreement into the securitization stream, where it would be packaged with other mortgages and sold as securities to investors.⁹³

⁹⁰ The author is unaware of any state's laws that treat different types of mortgages differently in terms of how foreclosures are handled within a particular state, apart from the notable exception that in New York State a new, pre-filing notice requirement has been imposed which applies only to certain high cost loans. See discussion *infra* Part III.B.1.

⁹¹ *Bair Testimony*, *supra* note 83, at 101–02 (explaining the structure of securitized borrowing and the disconnect between borrower and lender); see also Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 522 (2002) (describing how, as a result of the securitization process, subsequent purchasers of subprime mortgages are immune from suit regarding misrepresentations made by the original “predatory lender”).

⁹² Brescia, *supra* note 3, at 292–95 (explaining the severance of the traditional “Borrower-Lender Relationship”).

⁹³ *Cole Testimony*, *supra* note 83; Krinsman, *supra* note 83, at 14; John Kiff & Paul Mills,

These investors, on the strength of endorsements by ratings agencies and originators and a faith in the health of the U.S. housing market, believed their purchases were solid investments.⁹⁴

Mortgage brokers and originators were paid commissions each time they packaged a loan and securitized it, and ratings agencies received payments each time they reviewed the value of the mortgages placed before them. As a result, the focus on securitization as a means of generating more income for loans and more commissions and fees for the players within the system prioritized an increase in the quantity of mortgage deals over their quality. The hunger of investors to purchase these securities drove lenders to seek out more borrowers and package more loans. As fewer viable borrowers could be found, this process—commission and fee driven—resulted in lowered underwriting criteria, and loans extended to borrowers who were riskier bets.⁹⁵

Furthermore, because borrowers also shared an unhealthy faith in the strength of the housing market, many of the loans made in the years 2005 and 2006 were subprime in nature and contained initial “teaser rates,” low rates at the outset of the loan that would reset in a relatively short period of time, typically two or three years.⁹⁶ Believing they could refinance their loans before the rates reset by utilizing the equity in their homes that would inevitably expand with rising property values, many borrowers entered into such subprime loans with either little regard for their ability to make their payments upon reset or little understanding of the impact of such resets on their monthly mortgage payments.⁹⁷ As the housing market began to weaken in 2006 and lenders began to worry about the viability of

Money for Nothing and Checks for Free: Recent Developments in U.S. Subprime Mortgage Markets 7 (Int'l Monetary Fund Working Paper, No. 188, 2007).

⁹⁴ See Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1513–16 (2008) (providing a primer on the securitization process).

⁹⁵ *Subprime Mortgage Market Turmoil: Examining the Role of Securitization: Hearing Before the Subcomm. on Secs., Ins., and Invs. of the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. (2007) (testimony of Christopher L. Peterson, Assoc. Professor of Law, Univ. of Fla.) [hereinafter *Peterson Testimony*]; *Subprime Mortgage Market Turmoil: Examining the Role of Securitization: Hearing Before the Subcomm. on Secs., Ins., and Invs. of the S. Comm. on Banking, Hous., and Urban Affairs*, 110th Cong. (2007) (testimony of Kurt Eggert, Professor of Law, Chapman Univ. School of Law) [hereinafter *Eggert Testimony*]; Krinsman, *supra* note 83, at 14; Kiff & Mills, *supra* note 93, at 7–11.

⁹⁶ *Calculated Risk: Assessing Non-Traditional Mortgage Products: Hearing Before the Subcomm. on Hous. and Transp. and Subcomm. on Econ. Policy of the S. Comm. on Banking, Hous., and Urban Affairs*, 109th Cong. (2008) (testimony of Michael D. Calhoun, President, Center for Responsible Lending).

⁹⁷ *Id.*; Krinsman, *supra* note 83, at 13.

outstanding loans, housing values dropped, credit markets dried up, lenders strengthened underwriting standards, and borrowers could no longer obtain mortgage refinances as easily as before.⁹⁸ As a result, rising defaults and a rapid escalation of foreclosure filings have ensued, as many borrowers are seeing their interest rates reset and are unable to find viable refinance options.

In addition to being saddled with bad loans, borrowers do not know where to turn to try to negotiate with the entities that now own their mortgages. In fact, in the new world of securitization, there may not be a single entity that owns the mortgage as a whole. When securitized, that mortgage most likely was sliced up and sold to different investor classes, with some holding a stake in principal payments and others holding a stake in interest payments.⁹⁹ Most likely, the borrower's only communication regarding the loan has been with a loan servicer—an entity responsible for collecting mortgage payments, monitoring defaults, and pursuing foreclosures when warranted.¹⁰⁰ Should the borrower attempt to negotiate better terms, a refinance arrangement, or a payment plan for arrears, many of the securitization agreements currently in place limit the servicer's ability to restructure any loans or offer borrowers any leniency with respect to their obligations.¹⁰¹ Such negotiations had proven so fruitless at the outset of the crisis that a survey of loan servicers conducted in 2007 revealed that they had modified just 1 percent of the adjustable rate mortgages they managed.¹⁰²

While these barriers to communication and negotiation are structural defects in the subprime mortgage market and have proven daunting and insurmountable for some, recent developments may improve the likelihood that there will be greater communication between borrowers and mortgagees. Moreover, there has been increased federal intervention in this market, which means the federal

⁹⁸ *Cole Testimony*, *supra* note 83; *The Role of the Secondary Market in Subprime Mortgage Lending: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 105–06 (2007) (testimony of Warren Kornfeld, Managing Dir. of Moody's Investors Serv.) [hereinafter *Kornfeld Testimony*]; Kiff & Mills, *supra* note 93, at 7.

⁹⁹ *Kornfeld Testimony*, *supra* note 98, at 108.

¹⁰⁰ See *Eggert Testimony*, *supra* note 95; *Peterson Testimony*, *supra* note 95 (detailing service agreements and specialty servicers).

¹⁰¹ See *Bair Testimony*, *supra* note 83, at 102; Kiff & Mills, *supra* note 93, at 13; see also *Kornfeld Testimony*, *supra* note 98, at 116 (analyzing benefits and drawbacks of loan modifications); Krinsman, *supra* note 83, at 17 (suggesting that loan modifications can help prevent foreclosure, and indicating that service agreements limit modification).

¹⁰² MICHAEL P. DRUCKER & WILLIAM FRICKE, MOODY'S SUBPRIME MORTGAGE SERVICER SURVEY ON LOAN MODIFICATIONS (2007), available at http://www.americansecuritization.com/uploadedFiles/Moodys_subprime_loanmod.pdf.

government has a stronger hand at influencing the extent to which delinquent mortgages are modified.

First, the HOPE NOW alliance was announced in October of 2007 as a voluntary effort undertaken by mortgage lenders, loan servicers, housing counselors, and investors to improve their contact with borrowers in the hope that such improved contact would increase opportunities for negotiations regarding loan terms and loan modifications.¹⁰³ According to HOPE NOW's own estimates, as of June 2008, participants in the alliance had prevented 1.9 million foreclosures since July 2007 through loan modifications and repayment plans.¹⁰⁴

Second, on July 30, 2008, President George W. Bush signed the Housing and Economic Recovery Act of 2008 into law,¹⁰⁵ which offers the prospect of broad relief for an estimated 400,000 borrowers in distress.¹⁰⁶ The centerpiece of the legislation is the availability of up to \$300 billion in loan guarantees for refinance loans that help borrowers with a heavy debt burden.¹⁰⁷ For borrowers paying over 30 percent of their monthly income towards their mortgage obligations, occupying the home that is the collateral for the mortgage, and agreeing to share a portion of any home value appreciation with the federal government should they ultimately sell their home, the federal government will offer lenders the opportunity to refinance the underlying mortgage as a fixed rate, federally insured mortgage, provided the lender is willing to accept a reduction in the principal of the loan.¹⁰⁸

Third, the federal takeover of Fannie Mae and Freddie Mac means the federal government has a greater ability to influence millions of mortgages that are still owned by those entities, even though this represents a very small percentage of the mortgages these entities once owned. The Federal Housing Finance Agency, the federal agency now in charge of Fannie and Freddie and their assets, can press for modifications and workouts of delinquent loans in the

¹⁰³ See Press Release, Henry M. Paulson, Jr., Secretary, U.S. Dep't of Treasury, Statement on Announcement of New Private Sector Alliance – HOPE NOW (Oct. 10, 2007), available at <http://www.ustreas.gov/press/releases/hp599.htm>.

¹⁰⁴ Press Release, HOPE NOW, Mortgage Servicers Set Monthly, Quarterly Records for Helping Homeowners Avoid Foreclosure 2 (July 30, 2008), available at http://www.hopenow.com/upload/press_release/files/June%202008%20Data%20Release.pdf.

¹⁰⁵ Pub. L. No. 110-289, 122 Stat. 2654 (2008).

¹⁰⁶ CONGRESSIONAL BUDGET OFFICE, COST ESTIMATE: FEDERAL HOUSING FINANCE REGULATORY REFORM ACT OF 2008 8 (2008).

¹⁰⁷ Pub. L. No. 110-289, § 1402, 122 Stat. 2654, 2806-07.

¹⁰⁸ Among other things, the legislation commits the federal government to underwriting Fannie Mae and Freddie Mac, and provides up to \$4 billion for local communities to purchase discounted foreclosed properties. See Pub. L. No. 110-289, § 2301, 122 Stat. 2654, 2850.

federal portfolio. This has already begun with the mortgages held by IndyMac, the failed mortgage bank recently taken over by the Federal Deposit Insurance Agency; over 25,000 loan modification proposals have been offered to IndyMac borrowers in distress.¹⁰⁹

And as this Article goes to print, the Obama Administration is rolling out a new foreclosure prevention policy, the details of which have yet to be revealed, that will strengthen and expand these opportunities for loan modifications.¹¹⁰

But, to date, all of these initiatives are voluntary in nature, and the success of voluntary modifications has been limited. If carried out through the foreclosure process in a court utilizing problem-solving techniques, however, modifications could prove more effective than mere voluntary efforts.

As the Comptroller of the Currency, John C. Dugan, recently noted, many borrowers in voluntary loan modifications have defaulted again on their modified loans. Dugan did not have a definitive reason for the high re-default rate, and asked the following questions:

The question is, why is the number of re-defaults so high? Is it because the modifications did not reduce monthly payments enough to be truly affordable to the borrowers? Is it because consumers replaced lower mortgage payments with increased credit card debt? Is it because the mortgages were so badly underwritten that the borrowers simply could not afford them, even with reduced monthly payments? Or is it a combination of these and other factors? We don't know the answers yet, but these are the types of questions that we have begun asking our servicers in detail.¹¹¹

¹⁰⁹ Vikas Bajaj, *U.S. Holds the Whip Hand in Modifying Mortgages*, N.Y. TIMES, Sept. 13, 2008, at C1.

¹¹⁰ Sheryl Gay Stolberg & Edmund L. Andrews, *\$275 Billion Plan Seeks to Address Crisis in Housing*, N.Y. TIMES, Feb. 19, 2009, at A1. As part of the Obama Administration's plan, the President will also attempt to work with Congress to amend the bankruptcy code to permit bankruptcy courts to modify mortgage loans. For borrowers, bankruptcy is a costly and time-consuming process, see Michele J. White & Ning Zhu, *Saving Your Home* in Chapter 13 Bankruptcy 20 (Nat'l Bureau of Econ. Research Working Paper No. 14179, 2008) (estimating average cost to the debtor of \$6,000 for filing Chapter 13 Bankruptcy), available at <http://www.econ.ucsd.edu/~miwhite/white-zhu-nber14179.pdf>, and, at least according to the banking industry, might actually tighten credit prospectively. See MORTGAGE BANKERS ASSOCIATION, CONGRESS SHOULD AVOID FURTHER DESTABILIZATION OF THE MORTGAGE LENDING MARKET THROUGH BANKRUPTCY CRAM DOWN (2009), available at <http://www.mbaa.org/files/AU/IssueBriefs/CramDownIssueBrief.pdf>.

¹¹¹ John C. Dugan, Comptroller of the Currency, Remarks before the Office of Thrift

Alan White's recent analysis of loan modifications might shed some light on these questions. He has shown that many recent voluntary loan modifications executed to date do not actually result in a reduction of the monthly payments borrowers must pay, which raises questions about their utility and puts into doubt their likely effectiveness.¹¹²

Nevertheless, these new initiatives and developments could make communication between borrowers, servicers, and lenders easier and offer greater opportunities for modifications, loan repayment plans, and refinancing.¹¹³ It is without question that the barriers to communication between borrowers and servicers and the limits on forbearance embedded in many securitization agreements have proven challenging to overcome. The HOPE NOW alliance, the new federal legislation, and greater federal intervention in the market may turn the tide; greater communication seems possible and the benefits to be derived from it real. Given these enhanced incentives, and the knowledge that a foreclosure is often in the best interest of no one, ensuring that borrowers, servicers, lenders, and investors all are aware of these opportunities and can access them quickly and efficiently will be critical to their success. Critical, too, to any success will be judicial involvement in the negotiation, consummation and enforcement of these agreements, which would be, without question, a goal of any problem-solving approach to adjudication of foreclosure disputes.

D. Value of Counseling and Social Services Interventions

As in other settings where problem-solving courts have shown their value, the mortgage crisis is a setting in which non-legal interventions can prove beneficial to assisting litigants and the court in addressing the underlying reason the parties are before the court in the first place. As described above, in some ways the state of the

Supervision's 3rd Annual National Housing Forum 3 (Dec. 8, 2008) available at <http://www.occ.treas.gov/ftp/release/2008-142a.pdf> (noting that eight months after loan modification during the first quarter of 2008, 58 percent of borrowers were more than thirty days past due on their mortgage payments).

¹¹² See Alan M. White, *Deleveraging the American Homeowner: The Failure of 2008 Voluntary Mortgage Contract Modifications*, CONN. L. REV. (forthcoming 2009), available at <http://ssrn.com/abstract=1325534>.

¹¹³ In addition to these initiatives, prior to the federal takeover of Freddie Mac and Fannie Mae, Freddie Mac had announced new financial incentives for servicers that are able to secure loan modifications to avoid foreclosure. See FREDDIE MAC, SERVICER INCENTIVE PROGRAM (2008), available at http://www.freddiemac.com/sell/factsheets/pdf/servicer_incentive_program_372.pdf. It is not clear whether these will continue.

subprime mortgage market can be traced to subprime borrowers' lack of understanding of the impact of mortgage interest rate resets on their monthly budgets, and, for some, a mistaken belief that they could refinance their mortgages and avoid such future resets. Had prospective borrowers taken into account the likely financial impact of these resets and recognized that refinancing might not be an option for them to avoid that impact, a percentage of subprime loans—perhaps a significant percentage—would not have been made in the first place. The reasons for this failure are myriad, but they all too often lead to a host of problems: defaults, neglected and abandoned properties, devalued securities, and foreclosures.

The incentive structure described above and present in the current mortgage market led some mortgage brokers and loan originators to deceive borrowers into thinking they could afford the loans they were offered. Borrowers were often asked to provide little support for their income statements, and while some understood full well that they were taking on substantial debt that their real incomes might not sustain, they often believed—or were led to believe—the strength of the housing market would allow them to sell their properties at a profit should the monthly payments prove to be unaffordable. Brokers and originators also preyed on unsophisticated borrowers from communities with low homeownership rates and pent up demand in an effort to boost mortgage sales. Once borrowers run into a mortgage interest reset, or other financial trouble, and face the prospect of mortgage delinquency, they often feel isolated and ashamed, unable to admit or recognize that they are headed for financial disaster.

In order for the subprime crisis to have been avoided, prospective borrowers clearly would have needed more information about the mortgage process in general, and the specific loans being marketed to them in particular, in order for them to steer clear of assuming unmanageable debt. While assistance that might prevent prospective borrowers from entering into mortgages they cannot afford or should not consummate is certainly worthwhile in the hope that we can prevent future crises,¹¹⁴ are there interventions that are available now that might assist borrowers already in default or steering towards delinquency? Generally speaking, the current foreclosure crisis lends

¹¹⁴ See, e.g., Roberto G. Quercia & Susan M. Wachter, *Homeownership Counseling Performance: How Can It Be Measured?*, 7 HOUSING POL'Y DEBATE 175 (1996), available at [http://www.mi.vt.edu/data/files/hpd_07\(1\)/hpd_7\(1\)_quercia.pdf](http://www.mi.vt.edu/data/files/hpd_07(1)/hpd_7(1)_quercia.pdf) (showing beneficial effects of pre-purchase counseling); Abdighani Hiram & Peter M. Zorn, *A Little Knowledge Is a Good Thing: Empirical Evidence of the Effectiveness of Pre-Purchase Homeownership Counseling* (Harvard Univ. Joint Ctr. for Housing Studies, Working Paper No. LIHO-01.4, 2001), available at <http://www.jchs.harvard.edu/publications/homeownership/liho01-4.pdf> (showing that pre-purchase counseling reduced mortgage delinquencies in study by 34 percent).

itself to certain interventions that can assist borrowers in avoiding foreclosure: access to budget and housing counseling, and short-term financial assistance.

Budget and housing counseling, even when performed post-purchase, can have a beneficial impact on borrowers' ability to remain current in their mortgages.¹¹⁵ Budget counselors can give borrowers in distress assistance assessing their income and expenses, restructuring unsecured and secured debt, and deciding the best course of action.¹¹⁶ Community-based homeownership counselors can provide a range of services to borrowers in need of assistance, and can often do so in culturally and linguistically appropriate ways.¹¹⁷ Non-profit groups from across the nation have developed a strong track record in providing housing counseling services to homeowners in distress, and banks are beginning to partner with such organizations to improve their ability to communicate with delinquent homeowners in the hope that, with such assistance, they can resolve such delinquencies or find suitable alternatives to foreclosure.¹¹⁸

In addition to counseling, many borrowers face short-term disruptions in their lives that can have ripple effects on their financial health. A temporary absence from work, a sick relative, a reduction in wages: these can all impact a borrower's ability to meet his or her mortgage obligations. Stop-gap measures can help alleviate these financial stressors and enable borrowers to remain current on their

¹¹⁵ Roberto G. Quercia et al., *The Cost-Effectiveness of Community-Based Foreclosure Prevention* (Harvard Univ. Joint Ctr. for Housing Studies, Working Paper No. BABC 04-18, 2004), available at http://www.jchs.harvard.edu/publications/finance/babc/babc_04-18.pdf (finding lower mortgage delinquency rates for recipients of post-purchase credit counseling).

¹¹⁶ True budget counselors should not be confused with so-called "mortgage rescue" scammers, who promise to assist borrowers with avoiding foreclosure, but often end up securing title to the borrower's home without their knowledge. For an overview of mortgage foreclosure rescue scams, see New York State Banking Department, Consumer Help and Information: Beware of Home Mortgage Foreclosure Rescue Scams, <http://www.banking.state.ny.us/brhmfirs.htm> (last visited Feb. 16, 2009).

¹¹⁷ Steven P. Hornburg, *Strengthening the Case for Homeownership Counseling: Moving Beyond "A Little Bit of Knowledge"* 9 (Harvard Univ. Joint Ctr. for Housing Studies, Working Paper No. W04-12, 2004), available at <http://www.jchs.harvard.edu/publications/homeownership/w04-12.pdf>; see also GEORGE W. MCCARTHY & ROBERTO G. QUERCIA, *BRIDGING THE GAP BETWEEN SUPPLY AND DEMAND: THE EVOLUTION OF THE HOMEOWNERSHIP, EDUCATION AND COUNSELING INDUSTRY* (2000), available at http://www.housingamerica.org/Publications/48506_BridgingtheGapBetweenSupplyandDemand.pdf.

¹¹⁸ OCC: IMPROVING CONTACT, *supra* note 82, at 6. For in-depth analyses of ways to strengthen home counseling services, see, for example, REN S. ESSENE & WILLIAM APGAR, JOINT CTR. FOR HOUSING STUDIES, HARVARD UNIV., *UNDERSTANDING MORTGAGE MARKET BEHAVIOR: CREATING GOOD MORTGAGE OPTIONS FOR ALL AMERICANS* (2007), available at http://www.jchs.harvard.edu/publications/finance/mm07-1_mortgage_market_behavior.pdf; MARK WIRANOWSKI, JOINT CTR. FOR HOUSING STUDIES, HARVARD UNIV., *SUSTAINING HOME OWNERSHIP THROUGH EDUCATION AND COUNSELING* (2003), available at http://www.jchs.harvard.edu/publications/homeownership/w03-7_wiranowski.pdf.

payments. In the form of grants or low- or no-interest loans, such temporary measures are sometimes all a family needs to overcome a temporary economic disruption that threatens to have more lasting impacts on their financial situation by resulting in a bankruptcy and/or foreclosure, loss of equity and other investments, displacement, or a damaged credit score. They can also be extremely cost effective—an influx of several thousand dollars to cover a few months' mortgage payments can save a family the hardship of displacement and a bank the trouble and expense of foreclosure, as well as the loss of tens of thousands of dollars in the value of the home.

As the following discussion shows, elected officials and court administrators are recognizing these aspects of the subprime mortgage crisis and utilizing tools at their disposal to address them. What follows is a description of some of these problem-solving initiatives.

III. LEGISLATIVE AND JUDICIAL EFFORTS TO ADOPT PROBLEM-SOLVING METHODOLOGIES IN THE FORECLOSURE CONTEXT

The following is an overview of efforts in several states, some enacted through legislation and others adopted through court administration reform, to help to stem the foreclosure crisis that is ravaging communities and creating a drain on court resources. These efforts come in several forms, including: early notification to the borrower of a mortgage default in order to improve the likelihood that borrowers will communicate with their loan servicers and lenders; enhanced mediation services; the expansion of housing counseling and other intervention services; and the creation of interdisciplinary, public/private task forces to address the foreclosure crisis in states and local communities. In the next section I will review mostly those efforts in three states—New York, Ohio, and Maryland—where these and other steps have been taken to address the impact of the subprime mortgage crisis and the foreclosure crisis that has followed.¹¹⁹ In addition, I will review the “hands on” role that many judges adjudicating foreclosures are beginning to adopt in an effort to ensure the legitimacy and credibility of the judicial response to the rising tide

¹¹⁹ According to one review, “20 states have launched formal foreclosure intervention or prevention initiatives. And 16 states have enacted both high-cost lending and foreclosure intervention laws. In addition, 13 states have created counseling hotlines to help those at risk of foreclosure, and several states are encouraging lenders to work with borrowers to find alternatives to foreclosure.” PEW CHARITABLE TRUSTS, *supra* note 71, at 16 (citation omitted); see also *id.* at 39–40 (presenting Appendix A, a chart of state-by-state efforts).

of foreclosures. It is respectfully submitted that each of these efforts is consistent with the techniques and features of problem-solving courts. Following the overview of these developments, I conclude with suggestions for ways that these problem-solving approaches can be streamlined and their effectiveness optimized.

A. A Note on the Foreclosure Process

Judicial foreclosure—a termination of the mortgagor's interest in the property that in effect allows the mortgagee to seize and/or sell the property—is the “predominant,” though often not the exclusive, method of foreclosure in the United States.¹²⁰ About 60 percent of states permit a “power of sale” foreclosure, through which a mortgagor grants to the mortgagee the right to terminate the interests of the mortgagor and foreclose on the mortgage through sale of the deed, typically by a sheriff or other public official.¹²¹ Even where power of sale foreclosures are permitted, there are certain situations where a mortgagee will elect to utilize the state's judicial foreclosure apparatus, for example, where there are lien priority disputes. There are also times where the judicial foreclosure process is mandatory, as is the case in those jurisdictions that require judicial intervention when a mortgagee seeks a deficiency judgment in addition to the foreclosure judgment, or where the mortgage documents do not permit a power of sale foreclosure.¹²²

While some of the problem-solving techniques described in this section can be used in the power of sale contexts, their utility is obviously more relevant where the mortgagee uses judicial foreclosure. Even though power of sale foreclosures are permitted in Nevada and California, the states with the highest mortgage foreclosure rates at the present time, judicial foreclosure is the exclusive method of foreclosure in many of the states that have been hardest hit by the subprime crisis: e.g., Florida, Illinois, New Jersey, New York, and Pennsylvania.¹²³ In these states where judicial foreclosure is the exclusive method of foreclosure, problem-solving interventions will have the greatest impact to the extent such interventions become mandatory elements of the foreclosure process. Even in those states where judicial foreclosure is not the exclusive

¹²⁰ See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.11 (5th ed. 2007); see also FORECLOSURE LAW & RELATED REMEDIES: A STATE-BY-STATE DIGEST (Sidney A. Keyles ed., 1995).

¹²¹ NELSON & WHITMAN, *supra* note 120, § 7.19.

¹²² *Id.* § 7.11.

¹²³ See *id.* § 7.11 n.1 (listing states in which judicial foreclosure is the exclusive method); see also Press Release, RealtyTrac, *supra* note 67 (describing foreclosure market data by state).

method, such problem-solving interventions can not only make the judicial foreclosure process more responsive to the needs of litigants and communities but some can also be utilized where power of sale foreclosure is followed.

B. Problem Solving Efforts

1. Early Intervention/Communication

In order to enhance communication between borrowers and servicers early in the process, one modification to the foreclosure process that has been adopted in New York and Maryland is the requirement that borrowers receive early notification that they are in default and that foreclosure proceedings are imminent, or, in the case of Maryland, that a foreclosure sale could take place because of the borrower's default. This notice often must contain information for the borrower about housing counseling services in the area that might be available to him or her, and typically must include information about how to communicate with the entity that may pursue the mortgage foreclosure.¹²⁴ There are several reasons for this early notification: to keep borrowers from delaying in seeking assistance until they are so far behind in their mortgage payments that the debt is insurmountable; to provide knowledge about the availability of housing counselors in their community; and to foster communication with the servicer or other entity that may pursue the foreclosure in the hope that a mutually beneficial resolution can be reached.

This early communication is critical because "[m]any borrowers are reluctant to call their lenders and most lack information about the alternatives that lenders can offer."¹²⁵ They also may be "unaware of the services that counselors or legal services can provide to help them reach an agreement with lenders."¹²⁶

In addition to requiring notices that go to borrowers prior to a foreclosure filing, several states have embarked upon media campaigns to encourage borrowers to seek assistance if they are delinquent or fear they may become delinquent in the future.¹²⁷

¹²⁴ See N.Y. REAL PROP. ACTS. LAW § 1303 (McKinney 2009); MD. CODE ANN., REAL PROP. § 7-105.1 (LexisNexis Supp. 2008). New York's early notification requirements only apply to certain subprime loans as defined in the state's banking laws. See N.Y. REAL PROP. ACTS. LAW § 1304 (McKinney 2009).

¹²⁵ PEW CHARITABLE TRUSTS, *supra* note 71, at 18.

¹²⁶ *Id.*

¹²⁷ See *id.* (mentioning Indiana, Maryland, Massachusetts, and Ohio as states in which state leaders have embarked upon media campaigns to alert borrowers about the importance of early intervention and encourage borrowers in distress to seek assistance).

2. Mediation

Through court initiatives, New York and Ohio are attempting to make mediation resources available to borrowers and lenders, typically through the expansion of such resources within the court system.¹²⁸ Like the early notification step, these efforts also encourage greater communication between borrowers, servicers, and lenders, and, by the intervention of mediation personnel, are intended to assist litigants in reaching mutually beneficial settlements. These additional resources are necessary because judges might not have the time to mediate each case to the extent necessary to maximize the chance for resolution.¹²⁹

In New York, foreclosure plaintiffs must provide notice to borrowers in default of the availability of mediation services through the courts and such notice must come with the initial filing of the foreclosure summons and complaint.¹³⁰ In Ohio, similar notices must be included with the summons and complaint, but the program is not mandatory; the state supreme court has encouraged local courts to adopt the proposed mediation plan, and the court recently announced that courts in all eighty-eight Ohio counties are utilizing mediation as an option for litigants in the foreclosure context.¹³¹

These mediation programs are helpful because borrowers, who might otherwise fear the court system and default on the foreclosure action by failing to appear to contest it, might be more willing to

¹²⁸ See FORECLOSURE PLAN FOR NEW YORK COURTS, *supra* note 69; SUPREME COURT OF OHIO, FORECLOSURE MEDIATION PROGRAM MODEL (2008), available at http://www.sconet.state.oh.us/dispute_resolution/foreclosure/foreclosureMediation.pdf [hereinafter OHIO FORECLOSURE MEDIATION PROGRAM].

¹²⁹ While there is extensive scholarship on the question of what cases settle and what cases go to trial, see, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984), and articles responding to the Priest-Klein theory, e.g., Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996) (surveying literature testing the Priest-Klein theory), a literature review regarding this question is beyond the scope of this inquiry. One empirical study of tax court litigation is instructive for the purposes of this discussion, however. In that study, the author showed that in one forum cases in which no mediation was undertaken were four times as likely to go to trial as those in which mediation was utilized. Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999). For an assessment of the value of alternative dispute resolution generally, see Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995).

¹³⁰ FORECLOSURE PLAN FOR NEW YORK COURTS, *supra* note 69, at 2–3 (“The goal of this Program is to encourage lender-borrower negotiations prior to the filing of a foreclosure action, conduct court conferences as early as possible in the case to explore the possibility of a workout or settlement, and failing that, to arrive at a case management plan that helps avoid unnecessary delays.”).

¹³¹ Press Release, Supreme Court of Ohio, Foreclosure Mediation Available in all 88 Counties in Ohio (Jan. 26, 2009), available at http://www.sconet.state.oh.us/Communications_Office/Press_Releases/2009/foreclosure88_012609.asp.

pursue mediation. It is hoped that the availability of these services, and the requirement of notification of their availability, will bring more borrowers into the court system and foster contact between borrowers and lenders to increase the likelihood of settlements that might avoid foreclosure.

The jurisdictions seeking to expand the availability of mediation services recognize that mediation is not appropriate for all cases, and they typically give judges and court personnel the discretion to assess whether cases are suitable for the process. There are a range of reasons why mediation might be inappropriate in a particular case. Most importantly, mediation may only delay what is ultimately inevitable if borrowers are no longer viable lending partners: for example, where a family might have significantly reduced income due to job loss and even a reduction of the monthly mortgage payments will not enable the borrower to remain current in his or her payments. Thus mediation could result in greater losses to the lender because the property could become devalued during the delay in foreclosure due to homeowner neglect, even if he or she remains in the home, and higher transactions costs. Greater depreciation of the property might also result in a higher deficiency judgment—the difference between the value of the mortgage and the value of the property—saddling the borrower with future debt obligations even after the house is lost. Furthermore, litigants should not see the mediation process as another way to exact greater financial pain on opponents, dragging cases out and driving up transactions costs like attorney's fees. Borrowers may do this in the hope that they may bend the bank's will; lenders can do it as well, hoping they can deplete any reserves the borrowers may have to pay their attorneys so that such borrowers might have to abandon viable defenses and counterclaims. Court personnel and judges must be able to assess when litigants are abusing the system and police such behavior, even if it means cases are not channeled through mediation programs.¹³²

Mediation is no cure-all for the deficiencies of the adversarial system, however, and attorneys must not leave their clients' interests at the door of the negotiation room. We cannot overlook the fact that mediation does not always overcome the problems that pro se litigants face in traditional adversarial settings, nor does it always mitigate the disparate treatment of people of color

¹³² For an analysis of situations in which mediation and alternative dispute resolution is appropriate and inappropriate, see, for example, Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985).

and women in traditional judicial settings.¹³³ Furthermore, while mediation will require attorneys to take a slightly different tack in the representation of the client, perhaps eschewing hard ball tactics and overlooking an opponent's procedural missteps along the way,¹³⁴ such efforts should always be carried out with the best interests of the attorney's client in mind. And in such a context, these efforts would be fully consistent with an attorney's professional responsibility.¹³⁵ In other words, where settlement and resolution of a foreclosure action is in the best interest of a particular party, that party's attorney (if the client is represented) should pursue such an outcome zealously, and tailor his or her conduct accordingly.

3. Enhanced Funding for Housing Counseling and Other Interventions

In addition to the increased funding found in the federal Housing and Economic Recovery Act of 2008 for housing counseling assistance and legal services for borrowers, states are also increasing their funding for such services in the hope that fewer homeowners will have to face foreclosure without some form of counseling and/or legal representation.¹³⁶ Such expanded services will undoubtedly strengthen the ability of borrowers to obtain greater information and assistance in navigating the foreclosure process and, hopefully, successfully avoid foreclosure altogether.

¹³³ See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (noting the presence of prejudice in the ADR context).

¹³⁴ For a description of the changing roles of attorneys in the problem-solving context, see Feinblatt et al., *supra* note 16, at 287.

¹³⁵ For a review of the ethical challenges lawyers face in mediation settings, see Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935 (2001); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905 (2000); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407 (1997).

¹³⁶ See, e.g., Press Release, N.Y. State, Governor Paterson Announces Historic Increase in Housing Funds (Apr. 10, 2008), available at http://www.ny.gov/governor/press/press_0410089.html (describing N.Y. Governor Paterson's announcement of \$25 million in new grants to fund housing counseling); Press Release, Minn. Dep't of Commerce, Governor Announces \$4.8 Million to Help Minnesotans Facing Foreclosure (Apr. 1, 2008), available at <http://www.state.mn.us/portal/mn/jsp/common/content/include/contentitem.jsp?contentid=536916039> (describing Minnesota Governor Pawlenty's announcement of a federal grant to the state to increase housing counseling by \$4.3 million).

4. *Role of Governmental and Non-Governmental Experts in Bringing About Systemic Change*

Across the nation, various states, often at the request of governors, have created task forces to analyze the impact of foreclosures within the state and make recommendations as to what types of legislative reform might be appropriate and what kind of interventions might be helpful to reduce the harmful impacts of foreclosures on communities, municipalities, and states. Such task forces are active in at least California, Connecticut, Maryland, Michigan, Ohio, New York, and Virginia.¹³⁷ These task forces are typically made up of government officials, including attorneys general and bank regulators; industry representatives, such as mortgage brokers and lenders; and consumer advocates, such as social service providers and legal services attorneys. They have advocated for legislative changes, issued reports, and made other types of formal recommendations with respect to ways that government and the private sector can respond to the unfolding foreclosure crisis.¹³⁸

5. *Active Judges*

In addition to the systemic responses of court systems to the rising numbers of foreclosures, judges across the nation are taking proactive steps to monitor cases and trends in this area, developing best practices for handling these cases and watching out for litigants using abusive tactics. On their own, Judges of Brooklyn's Supreme Court in New York have created the Brooklyn Foreclosure Committee, in which judges routinely meet to discuss their growing docket of foreclosure cases, and have instituted the use of standardized processes and forms in the borough.¹³⁹

¹³⁷ See PEW CHARITABLE TRUSTS, *supra* note 71, at 27–31. Information about these task forces and their activities can be found throughout the world wide web. See, e.g., Maryland Homeownership Preservation Task Force, <http://www.dhcd.state.md.us/WEBSITE/taskforce/taskforce.aspx> (last visited Feb. 1, 2009); Michigan State Foreclosure Task Force, <http://www.cedam.info/foreclosure.htm> (last visited Feb. 1, 2009); New York State HALT Task Force, <http://www.banking.state.ny.us/cshalt.htm> (last visited Feb. 1, 2009); Virginia Foreclosure Prevention Task Force, <http://www.dhcd.virginia.gov/vfptf/> (last visited Feb. 1, 2009).

¹³⁸ See, e.g., TED STRICKLAND & KIMBERLY A. ZURZ, OHIO FORECLOSURE PREVENTION TASK FORCE FINAL REPORT (2007), available at <http://www.com.state.oh.us/admn/pub/FinalReport.pdf>; RAYMOND A. SKINNER & THOMAS E. PEREZ, MARYLAND HOMEOWNERSHIP PRESERVATION TASK FORCE REPORT (2007), available at <http://www.dhcd.state.md.us/Website/home/document/TaskForceReportFinal.pdf>; SUB-PRIME MORTGAGE TASK FORCE, STATE OF CONN., FINAL REPORT (2007), available at <http://www.chfa.org/mainpages/1109%20Subprime%20Final%20Report.pdf>.

¹³⁹ Mark Fass, *Judges Take the Reins in Brooklyn Foreclosures*, N.Y.L.J., Feb. 25, 2008, at 1.

Courts have also begun to take a hard look at the foreclosure applications before them, scrutinizing foreclosure pleadings and the documents that are supposed to establish plaintiffs' claims and relationship to the property that is the subject of the foreclosure. Many courts are finding that such support is severely lacking. Indeed, a tremor was sent through the mortgage industry on Halloween of 2007, when Judge Christopher A. Boyko of the U.S. District Court for the Northern District of Ohio issued an opinion in a series of foreclosure cases in which he took the plaintiffs' lawyers to task for failing to establish their clients' claims to the mortgages that formed the basis of the foreclosure actions.¹⁴⁰ The plaintiffs had allegedly been assigned an interest in the underlying mortgages, but Judge Boyko found that those plaintiffs had failed to establish their standing to bring the actions: i.e., they had failed to prove that an effective assignment of the mortgages had been properly executed.¹⁴¹ Judge Boyko reserved choice words for the plaintiffs' lawyers—who tried to convince the judge that he did not understand complex mortgage instruments and that their actions were consistent with the practice in the industry—by responding: "Plaintiff's, 'Judge, you just don't understand how things work,' argument reveals a condescending mindset and quasi-monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process."¹⁴² Judge Boyko insisted that the courts have an independent duty to monitor the foreclosure process and ensure the integrity of the courts:

[T]his Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede those obligations.¹⁴³

Although Judge Boyko's scrutiny of the pleadings in the cases before him was an attempt to ensure that there was appropriate diversity jurisdiction for him to consider the relief sought, judges across the country are starting to take a closer look at the pleadings

¹⁴⁰ *In re Foreclosure Cases*, Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007).

¹⁴¹ *Id.* at *1–2.

¹⁴² *Id.* at *3 n.3.

¹⁴³ *Id.* at *2.

and foreclosure applications before them, and following Judge Boyko's lead.¹⁴⁴

Such interventions are necessary so that the courts are not seen as doing the bidding of the banks, without regard for the due process rights of the mortgagors and the legal requirements mortgagees must meet to obtain foreclosures. Courts are seeing a dramatic increase in foreclosure actions, and in some jurisdictions up to 90 percent of them are granted on default,¹⁴⁵ creating the perception that the courts are merely rubber stamping the demands of the banks. But courts can play a critical role in ensuring that the foreclosure process has integrity, a reminder Judge Boyko gave in his opinion:

The [financial] institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.¹⁴⁶

In terms of institutional integrity, courts must combat the perception that they are seen as an arm of the banks, carrying out their bidding without regard for the independence of the judiciary.

IV. TOWARDS A COMPREHENSIVE, PROBLEM-SOLVING APPROACH TO FORECLOSURE PROCEEDINGS

Problem-solving approaches are techniques that can assist judges, litigants, and the general public to address crime and other issues that can pose challenges to courts utilizing conventional court methods. A more holistic judicial approach to problems such as criminal conduct accompanying drug use and domestic violence is being

¹⁴⁴ See, e.g., *Bank of New York v. Williams*, 979 So. 2d 347 (Fla. Dist. Ct. App. 2008) (affirming the lower court's dismissal of the plaintiff bank's foreclosure complaint for failure to show ownership interest in mortgage and promissory note); *HSBC Bank USA, Nat'l Ass'n v. Perboo*, No. 38167/07, 2008 WL 2714686 (N.Y. Sup. Ct. July 11, 2008) (denying plaintiff's application for default judgment for deficiencies in the filing); *Wells Fargo Bank, Nat'l Ass'n v. Reyes*, No. 5516/08, 2008 WL 2466257 (N.Y. Sup. Ct. June 19, 2008) (dismissing complaint for plaintiff's failure to establish ownership of mortgage).

¹⁴⁵ See, e.g., FORECLOSURE PLAN FOR NEW YORK COURTS, *supra* note 69, at 1. There are several reasons for such a high default rate:

Many of these [defaults] are intentional, informed defaults by homeowners who have concluded that they simply cannot afford to save their homes. Other defaults may be the result of the homeowner's lack of knowledge or understanding of the legal process, or the inability to afford or access help from available legal or counseling services.

Id.

¹⁴⁶ *In re Foreclosure Cases*, 2007 WL 3232430, at *3 n.3.

utilized in an attempt to address the underlying causes of such behavior. Can problem-solving approaches—a focus on outcomes and systemic change, the inclusion of interdisciplinary interventions, and the participation of an active judge in a more non-adversarial setting—bring about meaningful and systemic change for borrowers and lenders involved in the fallout from the collapse of the subprime mortgage market in the United States?

Problem-solving judges were asked whether problem-solving principles might be applied in settings beyond those found in traditional problem-solving courts. They concluded that in order to adopt problem-solving principles, judges in conventional courts could be more active, have more interaction with litigants, monitor cases more closely, integrate social services interventions into their handling of cases, and encourage a less adversarial approach to resolving disputes.¹⁴⁷ Indeed, cases ripe for problem-solving approaches include those in which court intervention and the provision of social services can address the underlying problem giving rise to the dispute.¹⁴⁸

The state of the mortgage market is analogous to the social forces that drove the creation of problem-solving courts in the 1990s: a rapid increase in case filings that are straining judicial resources, deep impacts from the foreclosure fallout on communities, and concerns for the legitimacy of the courts as a check on over-reaching by lenders. Given the value of problem-solving approaches in these other settings, the principles that have emerged in problem-solving courts¹⁴⁹ (active judges, mediation, housing counseling and other social services interventions, and interdisciplinary approaches) can all play a role in addressing the subprime crisis and the foreclosure fallout that has followed. In response to this crisis, we have seen that state courts, executives, and legislatures are bringing problem-solving principles to bear on the foreclosure problem; indeed, they are ramping up mediation alternatives to foreclosure, increasing housing counseling and advocacy services, and forming interdisciplinary bodies to address the foreclosure crisis. Judges are sharing information about foreclosure processes and attempting to scrutinize pleadings carefully to ensure the courts are responding thoughtfully to the crisis and guarding their own legitimacy.

From a problem-solving perspective, these are all encouraging signs. To date, however, no court has embraced fully the

¹⁴⁷ RESOLUTION 22, *supra* note 56, at 2.

¹⁴⁸ See Farole et al., *supra* note 60, at 57–65.

¹⁴⁹ See *supra* Part III.

problem-solving approach in the foreclosure context. To do so would require the creation of specific courts to handle such cases exclusively. It would involve channeling the power of the judiciary and representatives of other disciplines, like social workers, donors, social service agencies, and volunteer and legal services attorneys, focusing the energies of such actors in a comprehensive and efficient fashion.¹⁵⁰ The institutions created would be more than just “specialized” courts, ones that handle cases in a particular subject matter area.¹⁵¹ Such problem-solving foreclosure courts would handle all such cases in a community, enlist the assistance of mediators and social service providers, and coordinate with critical stakeholders in the community: local housing officials and banking regulators, bank officials, legal services providers, volunteer attorneys, foundations, and housing counseling agencies.

It is respectfully submitted that such an effort would make the creative interventions described herein more effective and efficient and bring about a more comprehensive, systemic approach to the foreclosure crisis facing communities across the nation. It would enable judges to develop a wide range of “soft” skills: a knowledge of the litigants and the stakeholders; an understanding of the impacts of foreclosure on particular communities; a familiarity with the range of services and programs available; and a systemic vision for trends and forces at play in their courtrooms, the broader community, and even the nation.

Social service providers and foundations could focus their staffing patterns around a single courtroom, directing and coordinating resources in an efficient way and not trying to put out fires in

¹⁵⁰ The Cook County court system in Illinois has created specialized foreclosure courts, but their case load, with about a dozen judges each handling a docket of 6,000 cases, leaves little room for problem-solving principles to be applied. Azam Ahmed, *The View from Foreclosure Court; And It's Not Pretty as Cook County Cases Could Top 42,000 This Year*, CHI. TRIB., Oct. 20, 2008, at C1, available at <http://archives.chicagotribune.com/2008/oct/20/nation/chi-foreclosure-court/oct20>.

¹⁵¹ The existence of specialized courts is pervasive. They are found in the bankruptcy, landlord-tenant, commercial law, international trade, and tax areas in both the state and federal systems. They handle trials, like the Delaware Chancery Court, and appeals, like the Federal Circuit Court of Appeals. For a review of the issue of specialized courts, see Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1 (1995); Rochelle C. Dreyfuss, *Specialized Adjudication*, 1990 BYU. L. REV. 377; Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995). While many problem-solving courts are also specialized courts to an extent—community courts and integrated domestic violence courts are in some ways specialized, though they might have broad subject-matter jurisdiction—the reverse is rarely true. Few purely specialized courts, if any, institute problem-solving approaches, at least not explicitly.

different courtrooms and even different courthouses.¹⁵² The value of such efforts is obvious:

Integrating the work of community services (mental health, public health, and so forth) into the judicial system also may be easier in a specialized court than in a generalist court. Specialized subject matter affords the judges and community professionals a frequency of contact that builds mutual understanding and respect. Such empathy and mutual regard is difficult to foster through the infrequent contacts that judges and other professionals traditionally have in a generalist court.¹⁵³

Housing officials and banking regulators could coordinate their efforts with court personnel from a single courtroom and not have to respond to requests for interventions from a multitude of judges and litigants. Foreclosure prevention task forces could coordinate efforts with the judge handling foreclosures, who could report on trends and systemic issues seen as they develop in real time before her eyes.

Legal services attorneys and volunteer lawyers could more readily serve homeowners, knowing that they can assist their clients more efficiently if they can be found in the same courtroom. Lawyers in the Boston Bar have committed to defending homeowners in foreclosure actions on a volunteer basis, an approach that the New York City Bar Association is adopting in conjunction with the Federal Reserve Bank of New York.¹⁵⁴ Making the provision of such services as streamlined as possible by concentrating the cases in a single courtroom would improve their impact while enhancing recruitment efforts as well.

Given the state of the mortgage market, in many disputes a resolution of the foreclosure proceeding—one that preserves the borrower's home, but results in a sensible and manageable workout of the debt—is often the optimal outcome for all with a stake in that outcome. Admittedly, if the housing market were stronger, and home values exceeded the outstanding balance on a home mortgage, lenders

¹⁵² See Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAV. SCI. & L. 445, 453 (2000) ("Economies of scale can potentially be achieved with specialized courts. . . . [and] may allow judges to have routine access to mental health and other professionals who can assist in identifying and addressing therapeutic issues.").

¹⁵³ *Id.*

¹⁵⁴ See Mass. Bar Ass'n, Foreclosure Legal Assistance, <http://www.massbar.org/for-attorneys/volunteer-opportunities/foreclosure-legal-assistance> (last visited Feb. 1, 2009); Press Release, Fed. Reserve Bank of New York, New York Fed Announces Formation of the Lawyers' Foreclosure Intervention Network, May 27, 2008, available at http://www.newyorkfed.org/newsevents/news/regional_outreach/2008/an080527.html.

might be more interested in foreclosure. Since many home values have fallen below the value of the outstanding debt on the home, and protracted litigation can only lead to a further devaluing of the property,¹⁵⁵ sensible workouts should be a viable option in the foreclosure setting. Hands-on judges who are aggressive in promoting settlement and have resources at their disposal that can facilitate negotiations between the parties will have the greatest chance of obtaining meaningful results through such negotiations.¹⁵⁶ Consistency of that judicial leadership is also critical, and at least in one problem-solving setting where positive outcomes were elusive, there was no single judge to manage the resources available in that court, diminishing the extent to which parties might have felt accountable to, and monitored by, the court.¹⁵⁷

As discussed earlier, studies establish that there are tangible benefits from problem-solving courts, though the results of such studies do not always reveal overwhelming success in all areas when the impacts of such courts are compared to those of conventional justice systems. Since these studies are relevant only to the contexts they assess, it is not clear that one can extrapolate from them a prediction of how effective a foreclosure court might be in terms of the metrics that one would apply to such a court: the extent to which the court would minimize the harmful community impacts of foreclosures; whether it would be more successful than traditional courts in assisting parties in reaching mutually beneficial settlements to foreclosure disputes; whether the courts could serve as a monitor of subprime lenders and subprime borrowers to ensure that parties acting in bad faith would not benefit from costly and time-consuming foreclosure proceedings; or whether courts would be perceived as playing a critical role in minimizing the harm to communities from the foreclosure fallout. In the problem-solving pantheon, since a specialized court is most closely analogous to a community justice court, the results of studies of such courts are encouraging—they show that communities with such courts generally perceive the court as playing a critical role in responding to problems in those

¹⁵⁵ See MORTGAGE BANKERS ASSOCIATION, *supra* note 81, at 4–6.

¹⁵⁶ Although the setting is not directly analogous, Peter Schuck's study of the settlement of the Agent Orange litigation shows the critical role that an active judge can play in bringing parties to reach settlements even in unwieldy and complex cases. See generally Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

¹⁵⁷ See John S. Goldkamp et al., *Context and Change: The Evolution of Pioneering Drug Courts in Portland and Las Vegas (1991–1998)*, 23 LAW & POL'Y 141, 161–62 (2001) (noting the negative impact on drug court outcomes of having rotating judges and reduced judicial role in monitoring of litigants).

communities by minimizing their impacts and helping to craft sensible solutions to them. In these ways, courts are seen as partners with the community, invested in dealing creatively and constructively with such problems.

The criticisms of problem-solving courts, as discussed above, can also be overcome in the foreclosure context. With respect to the efficacy problem, since community courts have been given good marks for responsiveness and legitimacy, it is hoped that foreclosure courts would score equally well in these areas. With respect to the civil liberties problem, active judges need not be “imperious” and can develop flexible responses to the needs of litigants and the community.¹⁵⁸ In terms of misdirected resources, *not* having consolidated courts—where the resources at a court system’s disposal would be stretched to serve all of the courts within that system that might handle foreclosure actions—would seem to be the true misdirection of resources when compared to concentrating them in a particular courtroom designed to deal specifically with foreclosures.

Channeling foreclosure actions before particular judges will not solve all of the problems faced by millions of homeowners across the United States, nor restore the tax base of communities depleted by falling home prices and abandoned properties. But such a response will help make dealing with homeowners in distress a little easier by permitting a fair assessment of the strength of the cases against them, ensuring any defenses that they may have are recognized, and directing holistic services to where they can have the greatest impact. While the foreclosure efforts instituted in different states, like pre-filing mediation, no doubt improve the ability of the courts to respond to the foreclosure process on the front end, designating particular judges in each jurisdiction to handle the foreclosure action throughout the process could enhance the court system’s ability to ensure these cases are handled in an effective, comprehensive, thoughtful, responsible, and responsive way, from start to finish.

¹⁵⁸ Dorf & Sabel, *supra* note 16, at 837.