

2003

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Recommended Citation

William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595 (2003).

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CRIMINAL DEFENDERS AND COMMUNITY JUSTICE: THE DRUG COURT EXAMPLE

William H. Simon*

In many drug courts the lawyers do not even show up for the regular drug court sessions, and even when they do, it is often difficult to determine just which persons in the courtroom are the attorneys.

JAMES NOLAN, REINVENTING JUSTICE¹

INTRODUCTION

The Community Justice idea and its core institution – the Community Court – is an ambitious innovation intended to generate new solutions and practices. It thus inevitably calls for adaptation of the established roles associated with the court system, and especially the criminal justice system. It asks practitioners to learn new skills, to accept new conventions, and to participate in the elaboration of a rapidly evolving experiment.

It is thus not surprising that many lawyers are anxious about the system. It remains an interesting question, however, whether their anxiety represents something more than the discomfort that change and challenge typically bring to people attached to the established ways of doing things. The fact that the new experiments call for innovation is hardly a strong objection to them. But we might plausibly regard dramatic change as raising a problem if it had either of two results:

First, change might be a problem if it required lawyers to violate ethical commitments fundamental to their role. To take an extreme example about another profession, consider a requirement that doctors carry out corporal punishment (on the theory that they could best calibrate the measure of pain inflicted). We might object on the ground that corporal punishment is bad, but even conceding that such punishment should be inflicted by someone, we might believe that it should not be inflicted by a doctor. Deliberately inflicting pain is so much in tension with other values we want doctors to adopt that we might doubt that the practice would be compatible with a coherent and appealing role morality. Coherent and appealing role moralities are important because, without them, it may be hard to attract good people to the job and motivate them to perform it well.

Second, change might be a problem if the skills required of the lawyer in the new setting had so little in common with skills in other lawyering settings that they did not seem part of a common intellectual discipline. This is a much less dramatic concern than the ethical one, but it raises interesting social issues. At some point,

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1. JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 40 (2001).

the discontinuity in skills will suggest that we should not be drawing on the profession to fill this role. Even before we reach that point, we may develop ideas about ways in which the role suggests reforms or adaptations of the conventional forms of training and organization of the profession.

I want to consider these issues in the context of the drug court. This is one of the most common forms of community courts, and it is the one in which the tension between traditional and new lawyering roles seems strongest. If community courts are compared to more traditional criminal processes, the following features stand out:

First, at least rhetorically and aspirationally, community courts focus on shared interests and norms. This involves a search for solutions that would be mutually beneficial to the defendant, the larger community, and perhaps other individuals, notably victims. From the defendant's point of view, this means the possibility of both lenience and beneficial services. It also means demands that he profess concern or commitment for community norms and interests. For court personnel, the theme connotes collaborative "team" relationships. The judge is more active and managerial; the prosecutor and defense counsel are less distant from the judge and each other.

Second, community courts impose a relatively long-term relation of coerced cooperation with the court. Cooperation means active and flexible compliance with a series of demands. Cooperation requires a waiver of rights to privacy and passivity that the defendant would enjoy at trial and afterwards if acquitted (but for the most part, would not if in prison). The cooperation is coerced because failure to comply is met with sanctions.

Third, the community court process is experimental. This means that each case is informed by experience in other cases and contributes to a developing body of knowledge that informs practice. It means further that practice both in individual cases and across the range of cases is provisional and subject to revision as learning occurs.

Community Justice, especially in its drug court version, has some resemblance to the "therapeutic jurisprudence" that influenced juvenile and family courts and mental health commitment processes earlier in the century. This is not a flattering comparison, since these earlier reforms have been subjected to powerful criticism.² In fact, however, the new model seems different in important respects from the older one. Community Justice takes account of recent changes in the practice of several professions. These changes have been influential in other areas of public policy, notably education, but they have only begun to be noticed in law.

A key difference lies in the conception of therapeutic judgment. To oversimplify: The older model gave broad and scantily reviewed discretion to therapeutic professionals, especially doctors. It conceived of professional judgment as an

2. See generally ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977).

isolated decision made by a single professional, grounded substantially in the tacit knowledge of her discipline. In contrast, in the conception that has influenced the community courts, professional judgment is associated with an interdisciplinary team process. Ideally, the bases of the judgment are fully explicit. And the judgment is accretive and provisional – part of an ongoing process of learning and experimentation. The goal of the process is to facilitate a kind of accountability that was not possible in the old model. Since each judgment is supposed to be explicit, and the basis that supports it fully transparent, more rigorous review of both individual judgments and entire programs should be possible.³

I want to consider the challenge the new approach represents for traditional conceptions of lawyering. I focus primarily on ethical concerns, which I take up in three steps. First, I consider the issue on the assumption that the lawyer's job is to advance, within the bounds of the law, the client's interests, as the client understands them. I then consider the issues from a perspective that relaxes the "as the client understands them" qualification – thus conceding that paternalism inevitably plays an important role in a large range of criminal cases, even in the ordinary process. Next, I consider the issues from an understanding of the lawyer's role that insists that, even in more traditional practice contexts, the role plausibly involves commitments to social or community, as well as client, interests. A final section considers whether the skills the new system demands of lawyers can plausibly be seen as grounded in a professional discipline shared with legal practitioners in other contexts.

I conclude that the demands drug courts place on defense counsel do not compromise their fundamental ethical commitments, even given the narrowest client-focused interpretation of defense counsel's role. I also conclude, albeit with less confidence, that the skill set required of defense lawyers in drug court does connect to a coherent intellectual discipline.

I. THE DEFENSE LAWYER AS CHAMPION OF THE CLIENT'S SELF-DEFINED INTERESTS

We should begin by taking at face value, for the moment, the most common self-description of the defense lawyer's role as advancing, within the bounds of the law, the defendant's interests, as the defendant herself defines them. This is a variant of the bar's traditional description of its role as advocating for a client "zealously within the bounds of the law,"⁴ and even those who question it concede that its plausibility is greatest in the criminal defense context.⁵

It is important to distinguish this "zealous advocacy" view from a much more

3. Here I follow Michael C. Dorf and Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 834, 837-39 (2000) (arguing that a model for treatment courts as open and evolving experimentalist institutions allows for continuous development and innovation).

4. E.g., MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

5. E.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 58-66 (1988).

specific view of criminal defense that might be called “Warren Court Libertarianism.” The latter view expresses a deep suspicion of the state and an anti-communitarian denial that criminal suspects and defendants have any duty to cooperate in the criminal justice process.⁶ Its practical strategies play out in a series of rights that make prosecution more difficult by refusing information (the privilege against self-incrimination), insisting on proof beyond a reasonable doubt of each element of the offense, excluding improperly acquired evidence, and testing the quality of the prosecution’s evidence at trial – irrespective of whether these practices advance accurate determination of guilt or innocence. Warren Court Libertarianism led to a view of criminal defense in which a (if not *the*) key role of defense counsel was to exploit or exacerbate the limitations on the state’s access to relevant information. (Of course, the Warren Court did not originate these themes or rights, but its criminal jurisprudence elaborated and focused on them.)

The major weakness of Warren Court Libertarianism was its relative indifference to substantive justice considerations, notably accurate determination of guilt or innocence and proportionality of punishment. Normatively, this is a weakness because it offends plausible and widely-held beliefs about the moral priorities of criminal justice. Strategically, it was a weakness because it made the Warren Court’s constitutional entrenchment of its program politically vulnerable.⁷ The Court’s decisions limited legislative discretion to directly curtail procedural rights, but because the Court largely declined to police the substantive fairness of punishment, legislative discretion over penalties remained vast. Legislatures were thus able to respond to the popular rejection of the Warren Court’s constitutional vision of procedural justice by extravagantly increasing penalties. From the defendant’s perspective, these reforms undermined the value of procedural rights. They could still be traded off to mitigate substantively harsh punishments, but even after the trade, punishment remained harsh. And the high penalties gave police and prosecutors so much leverage that whatever deterrent potential the Warren Court rights had over abusive practices was undermined.

There is no doubt that the Community Justice movement represents an aggressive repudiation of both Warren Court Libertarianism and its draconian counter-

6. For an example of this line of thinking, see *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The Court delineated a litany of “fundamental values” involved in the criminal justice system, including:

[O]ur sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load, . . . our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life, . . . our distrust of self-deprecatory statements.

Id. (internal quotes omitted).

7. See generally William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1767 (1993); William Stuntz, *The Uneasy Relation Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

reaction. Community Justice repudiates the Warren Court's categorical suspicion of (non-judicial) state officials; it also rejects that Court's strong commitment to privacy and its denial of duties to cooperate with the criminal justice system. And it shows no respect for the Warren Court's privacy and self-incrimination concerns, more or less openly aspiring to sweep them away as expeditiously as possible.

No doubt this attitude is troubling to lawyers committed to Warren Court Libertarianism, but it is important to distinguish Warren Court Libertarianism from the "zealous advocacy" vision of lawyering. The "zealous advocacy" view requires the lawyer to do the most she can to help the client advance her interests within whatever the given legal framework happens to be. Drug courts change the legal framework, but that does not entail changes in the ethical parameters of the lawyer's role. Community justice partisans portray their programs as simply expanding the range of choices for defendants. Some defenders have expressed doubts about this, but the matter is not really relevant to our question. Whether or not the defender is better off with the advent of the drug court, the lawyer's role remains to help him make the choice that best serves his interests among the options open to him.

Defense counsel emphasize two respects in which the drug court process differs from the conventional one.⁸ First, the defendant's choice whether to enter the drug court process involves both a longer term and a more uncertain set of contingencies than the choice of whether to go to trial. It's harder to advise the client in such circumstances. Second, when the defendant chooses the drug court, his lawyer has a continuing role in the process that does not have any counterpart in the normal criminal process. The aspect of this post-entrance role that seems to most trouble practitioners arises from the fact that the defendant has to waive privacy rights with respect to relevant information. This puts the lawyer in a position where she will have some responsibility for forcing or encouraging the client to comply with disclosure duties.⁹

To some extent, the problem of uncertainty seems a consequence of the newness of the program. Experience over time should give the lawyer a more substantial basis for client advice about the process. In addition, it's not unusual for lawyers to advise clients in highly uncertain situations. Uncertainty is simply a factor the client has to weigh in making her decision.

8. For a discussion of the ethical concerns of defense lawyers, see NOLAN, *supra* note 1, at 77-81; John Feinblatt & Derek Denckla, *Prosecutors, Defenders, and Problem-Solving Courts*, 84 JUDICATURE 207 (2001); Mae C. Quinn, *Whose Team Am I On Anyway?: Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000).

9. From some ethical perspectives, the fact that the community court model gives the lawyer a long-term responsibility for the welfare of the client is an advantage over the Warren Court model. In the first liberal critique of Warren Court Libertarianism, John Griffiths numbered the fact that the lawyer had no responsibility to the client after she had exhausted defenses to the charges—for example, no responsibilities to protest inhumane conditions of confinement—among its ethically unattractive features. John Griffiths, *Ideology in Criminal Procedure, or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970).

Moreover, if the aspirations of the drug court succeed, this uncertainty should progressively diminish. A central goal of the program is to achieve transparency about its practices and its efficacy. The norms of the experimentalist approach require an extreme degree of explicitness in defining practices and public reporting of performance assessment. Thus, over time, one would expect lawyer's to give far more precise data about drug court process and prospects than about more conventional alternatives.

Second, the lawyer's role in encouraging the client to comply with his disclosure obligations is consistent with basic professional norms and has many analogies in the civil sphere. In general, lawyers are not supposed to assist clients they know to be engaged in fraudulent or unlawful conduct.¹⁰ A client who lies or fails to disclose promised information is engaging in fraudulent or unlawful conduct. A major dimension of the practice of both civil lawyers in discovery and corporate lawyers in securities regulation is ongoing monitoring of their clients' compliance with disclosure obligations. It is true that the most likely professional duty of a lawyer who discovers noncompliance in these contexts is to withdraw (perhaps "noisily," with notice to affected parties), rather than report noncompliance to the authorities.¹¹ Whether a client's waiver on entering a drug court program should permit a higher disclosure duty to the drug court than a lawyer would have in these civil contexts is a debatable question. However, there is probably not a lot at stake here, since even the lawyer's unexplained withdrawal would signal client dishonesty to the prosecutors and court.

Moreover, the preoccupation with confidentiality misses the new opportunities drug courts create – opportunities that arise not just from the promise of leniency, but from new forms of accountability. Accountability is supposed to come from making judgments explicit and subject to challenge and by systematically generating and analyzing data on the court's interventions. This suggests a distinctive role for defense counsel, one grounded in traditional lawyering skills, but quite different from the practices of information control associated with Warren Court values.

The new role involves holding the program to its commitments to the client and forcing it to justify actions adverse to the client in terms of the program's values and experiences. The lawyer should be able to draw on the program's history and professed goals to help the client decide what he can plausibly demand from the program. The lawyer should be in a position to force the program to justify proposed adverse actions in terms of available knowledge. Advocacy can be powerful in this context as a way of helping the program professionals articulate and substantiate their premises. For example, the optimal calibration of sanctions

10. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

11. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 366 (1992) (noting the disclosure obligations of a lawyer who discovers that her client has violated a court order during litigation).

for noncompliance is currently a matter of debate. Therapeutic staff tend to call for tougher sanctions, but research on sanction severity is sparse and inconclusive, and a study of one court showed a inverse correlation between sanctions and both graduation and re-arrest rates.¹² Clearly, there is an important role for defense lawyers to play in this debate, both case-by-case and in discussions of general rules.

Defenders wonder how the lawyer can respect the premises of the adversary system and still be a “team member.” The answer depends on how we understand the adversary system. If we take seriously those conceptions of the adversary system that see it as a mechanism for combating prejudice and self-validating preconception through a division of labor designed to ensure that all perspectives are considered,¹³ then the adversary system fits well with experimentalism. On the other hand, if the adversary system means treating as a “fundamental value” the ability to conceal, obscure, or distort evidence when it is in the client’s interest to do so, the adversary system has no place in the experimentalist model. The extent to which this latter conception is embodied in legal authority is debatable, but it seems fairly clear that whatever rights are entailed by this conception are waivable.

II. THE DEFENSE LAWYER AS A SYMPATHETIC JUDGE OF WHAT THE CLIENT’S INTERESTS ARE

A savvy repeat-player defendant would often have sufficient experience with the system to make independent use of her lawyer’s advice. But the client of whom professional responsibility and constitutional norms are most solicitous is the inexperienced first-timer, with little knowledge of the law or its institutions. The latter is the kind of client most commonly encountered in drug court. Typically, those with prior offenses or charges of violent crimes are ineligible.

It is extremely difficult to advise an inexperienced client on a matter involving great uncertainties that depend on technical matters. Major criminal defense decisions have many of the characteristics that psychologists have shown impair coherent judgment – remote future contingencies, large risks, low probability/high cost outcomes, vividly imaginable outcomes competing with dimly imaginable ones. In theory, the defendant has to overcome the cognitive constraints associated with such decisions to process a huge amount of information, some of it quite technical, in a situation likely to involve emotional stress.

For many such defendants, the best strategy will be to ask the lawyer what to do and follow her advice. Even a defendant who wants to make her own decision is

12. STEVEN BELENKO, NAT’L CTR. ADDICTION AND SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 22 (2001) (reporting results of a multivariate analysis of drug court participants that depicted an association between the imposition of various drug court sanctions and both an increased rate of rearrest and a decreased probability of eventual program graduation).

13. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-19 (1980).

likely to be influenced by her lawyer's advice. The lawyer has only limited time to give advice, and the client has limited capacity to absorb it. No matter how committed the lawyer is to client autonomy, there is no effective way to give advice that is not influenced by her own views of the client's interests. To make intelligible the information the client needs, the lawyer must make decisions about inclusion and exclusion, sequencing, emphasis, and phrasing that will necessarily be influenced by her views of the correct decision. When the client articulates a choice, the lawyer should consider whether it reflects independent judgment. But there is no set of criteria for making that assessment independent of the criteria for deciding whether the choice seems to be in the client's interests.¹⁴

Thus, lawyers for unsophisticated clients are paternalists, whether they like it or not. They have to think and talk about what choices are in their clients' interests, and they cannot avoid influencing clients to adopt those choices.

Of course, lawyers are right to care about client autonomy and to strive to present alternatives as fairly as possible. But even when they do this, they cannot entirely escape responsibility for the choices their clients make. And this suggests that they need to have thoughtful opinions of their own about what choices are in the client's interests.

Thus, lawyers cannot plausibly define their duties to protect their clients' autonomy and rights independently of the goal of making these programs work for their clients. Lawyers who doubt that these programs adequately respect clients' rights *before* the lawyers themselves learn enough to decide whether the programs are effective in solving the underlying problem are missing the point.

This point about the inevitability of moderate paternalism applies to all inexperienced clients, even those of normal decision-making capacity. Of course, people who are addicted to drugs do not have normal decision-making capacity, though the extent of impairment varies widely. Addiction intensifies the need for the lawyer to take some responsibility for assessing whether treatment is in the client's interests in order to give adequate advice.

The treatment dimension of drug court proceedings involves an additional dimension of paternalism. In many drug courts, hearings and interactions with court personnel are staged for therapeutic effects. Public honor and shaming, and personal approval and disapproval are used to reward and sanction the defendant in ways that are clearly manipulative.¹⁵

A defense lawyer might become complicit in these tactics merely by remaining silent and failing to counteract them; no doubt there are often pressures for her to actively participate in them. This kind of therapeutic manipulation presents the lawyer with a series of issues that individually involve small stakes but cumula-

14. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 165 (Deborah L. Rhode ed., 2000).

15. See NOLAN, *supra* note 1, at 62-75.

tively may amount to a severe affront to the client's dignity and autonomy. It is a good thing for lawyers to be wary of this kind of therapeutic manipulation, and to protest it when it becomes abusive. But the basic point about paternalism applies to this pervasive but small-stakes conduct, as well as to counseling about conscious high-stakes decisions. It is very hard to distinguish the issue of whether the client's autonomy is being served from the issue of whether a tactic is in a client's best interests. Often, it will be plausible to think that the client consents to such manipulation, and not just in a formal sense. That someone inflicted with a disability that impairs her capacity for autonomous choice should desire to be coerced is a paradox to libertarians but also a widely observed fact of life. Whether the court's program is generally effective will often be the best indication of whether the client's autonomy is in jeopardy.

III. THE DEFENSE LAWYER AS SERVANT OF THE COMMUNITY

Defense lawyers are often ambivalent about their relation to the larger community or society. On the one hand, they see themselves as champions of an individual in his confrontation with organized society, and they fear duties to society will corrupt or subvert that role. On the other hand, they don't see themselves as servants of private interest. They are likely to distinguish their roles from those of business counsel in terms of their relative commitment to public service. Defenders routinely consider themselves "public interest" lawyers. (At Stanford, we once had a debate about whether prosecutors were "public interest lawyers" for the purposes of eligibility for a summer grant program, but I have never heard anyone question the qualifications of defenders for this designation.)

In theory, the values of client loyalty and public service are reconciled in the idea that a vigorous defense serves the public value of guarding against official abuse. This view is least controversial to the extent that defense tends to vindicate the innocent and force the resolution of doubts about guilt in favor of acquittal. It is more controversial with respect to those aspects of defense that tend to exclude or intentionally distort probative information or to require proof of matters that the defendant could not in good faith dispute. Defense lawyers believe that this type of defense serves the public by deterring police and prosecutorial abuse. Such beliefs, however, are largely a matter of faith and dogma, as there has been little effort to test the effectiveness of aggressive criminal defense in deterring such abuses. And criminal defenders have not been involved in such efforts; it has not been part of their conception of their job to test these premises. Thus, the connection between these practices and the public interest is indirect and speculative.

However, there is another respect in which defenders must take account of public values more directly. This is in the rationing of their services. Most criminal defendants cannot pay for their own defenses, and depend on public subsidy. But notoriously, public subsidy is not adequate to provide an elaborate defense (or in many cases, a more than perfunctory one) for most defendants. In these circum-

stances, defenders (especially in salaried-staff programs) find themselves having to make judgments about how to allocate resources among cases. To some extent, they can do so simply by considering what possible claims and defenses defendants have and allocating services in terms of the time required to assert them. But since resources are insufficient to fully develop all claims, priorities have to be set among clients. Presumably, defenders consult public values when they do this, favoring those claims and defenses that are more strongly supported by public values. They tend not to discuss this process publicly, and, to some extent, it seems to be done tacitly and unreflectively. But all programs must ration. And since rationing involves favoring some individuals over others, it cannot be done in terms of individual interests. Public or community values are the only principled basis for doing so.

Kim Taylor-Thompson, herself an experienced defender, recently argued explicitly that there is an important sense in which defenders have duties, not only to a series of individual clients, but to a broader community.¹⁶ She suggested that defenders sometimes do, and more often should, reject cases that would require them to raise defenses that they believe reflect bad policy or law. Where defenses involve general positions that are sometimes advantageous or sometimes disadvantageous to defendants – such as the admissibility of a category of scientific evidence that will sometimes be exculpatory and sometimes inculpatory – doctrine on “positional conflicts” might sometimes preclude the office from inconsistent positions and hence require the office to choose one side or the other. Such doctrine, however, does not impose strong constraints.¹⁷ Taylor-Thompson’s main concern is that coordinating defenses across cases can sometimes achieve leverage against bad practices. For example, if defendants consistently refuse to plead when prosecutors engage in a questionable practice—pressuring defendants to “snitch” on others, to take one of her examples—prosecutors may feel pressure to abandon or modify it. If the defenders are in a community vulnerable to law enforcement abuse, refusing to consider such strategies may deprive the community of one of their few potential political resources.¹⁸

However, Taylor-Thompson’s article suggests that the judgments that defenders currently make on behalf of the community are conditioned more than anything else by their own libertarian values.¹⁹ She assumes, for example, that the programs will take a position on the admissibility of a new kind of scientific evidence largely

16. See generally, Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2442 (1996).

17. See John Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 540 (1993).

18. Of course, all defendants are entitled to counsel, and counsel has a duty to raise any plausible defenses. So all these claims will be raised in one way or another. But in jurisdictions with a high-quality public defender program, public defenders are often more able and have more resources to conduct defenses than the assigned counsel to whom defendants are remitted when the program does not take the case.

19. See Taylor-Thompson, *supra* note 16, at 2441-42.

on the basis of whether the evidence will generate fewer convictions,²⁰ that defenders will distance themselves from clients who want to seek leniency by inculcating others,²¹ and (to take the example closest to the drug court situation) that they will discourage or refuse to represent clients accused of serious child abuse who are offered leniency in return for agreeing to monitored contraception.²² In principle, she agrees that “community” values ultimately control, but in the absence of evidence of what those values are, she is quick to assume that the community thinks like the Warren Court.²³

Most community court proponents will probably find this an implausible assessment of public values. Even poor communities are often at least as concerned about effective enforcement against private lawlessness as they are about abuse of public power. Moreover, the community court presupposes a set of public institutions subject to community control that might provide more direct and effective safeguards against official abuse than aggressive criminal defense. Yet clearly, there is no more reason to take these claims on faith than those of the defenders. If community courts are worthy of their name, then they should be able to defend their premises about community values by showing that their own processes have been open to extensive community participation. And if the claim is that problems of official abuse are better met by approaches other than criminal defense, the proponents should have some burden to show that these processes are in place and are being monitored to show that they are having the desired effect.

IV. THE TRANSFORMATION OF PROFESSIONAL IDENTITY

Lawyers need to acquire new skills to participate effectively in treatment courts. They need medical and psychological background to understand treatment methodology. They need background in social science and statistics to participate in the evaluation of the court’s practices.

The organization of lawyering in these settings is distinctive. Lawyers work as part of an interdisciplinary team. In litigation, especially criminal litigation, representatives of adverse parties do not usually consider themselves as part of a “team.” Yet, the idea seems less jarring in transactional work, where parties with adverse interests typically work, sometimes on a long-term basis, to pursue overlapping goals collaboratively. In many ways, it makes sense to see drug court practice as transactional, rather than as a kind of litigation.

It may be more unusual that the team is interdisciplinary in its composition.

20. *Id.* at 2436-47 (posing a scenario where the police department obtains a new electronic device that purports to determine an individual’s truthfulness).

21. *Id.* at 2457.

22. *Id.* at 2450 (posing hypothetical scenario in which defenders office would oppose such a strategy, in lieu of prison time, because it forces a client to make an impossible choice).

23. *Id.* at 2434-35 (asserting that when confronted by a conflict of interest between clients, “traditional defender offices tend to adopt individuated strategies almost reflexively”).

Lawyers often work on their own or with other lawyers formulating advice to be given directly to the client. Here the lawyer works with professionals from other fields. Although she does give advice directly to the client, she's also part of a process designed to make collective decisions. This approach is increasingly prominent in both industry and government, though lawyers as a group are less accustomed to it than other professions. It appears to be close to a professional paradigm in engineering.²⁴

Michael Dorf and Charles Sabel suggest that the growth of the interdisciplinary team approach is likely to change the self-conception and organization of the professions.²⁵ New identities develop around the teams and the problems they have been organized to work on. So in the drug court area, we have an Association of Drug Court Professionals – an organization of people with credentials in different professions but who think of themselves (at least some of the time) not as drug court lawyers, doctors or social workers, but as “drug court professionals.”

If this development continues, there are two paths it might take. First, identities and associations might bifurcate, with professionals having one foot in an identity organized around a specific kind of problem and one foot in an identity organized around one of the traditional disciplines. Or second, the traditional professions might disintegrate and be pre-empted entirely by the new problem-oriented identities. For most of the established professions, such as medicine and engineering, the first scenario seems plausible. These professions are organized around intricately developed intellectual disciplines, with associated research programs, that retain a good deal of intricacy and coherence. And the disciplines seem to underpin skills that play important roles in the problem-solving contexts.

But the situation of law seems more ambiguous. Its disciplinary paradigm is thinner and less coherent than those of the other established professions. Its generalist, dilettantish character is one of the appeals of legal education to people who lack more focused interests or ambitions. But the legal academy's connections to the world of practice have always been tenuous. If the new developments attenuate them further, the disintegration scenario might become more plausible. On the other hand, it seems possible that the profession might evolve in ways that strengthen its connections to problem-solving communities without losing its distinctive identity.

Law as an intellectual discipline consists of two types of skills, corresponding to the coercive and facilitative dimensions of law. The first type is concerned with the interpretation and analysis of norms governing the coercive activities of the state.

24. See INSTITUTE OF MEDICINE, CROSSING THE QUALITY CHASM: A NEW HEALTH SYSTEM FOR THE 21ST CENTURY 130-39 (2001). One indication of both the trend toward interdisciplinary professional teams and the difficulty lawyers have in adapting to it is the controversy about the relative responsibilities of lawyers and accountants for some of the disastrous decisions in the Enron scandal. See Joann Lublin et al., *How Real Are the Reforms?: Corporate-Oversight Bill Will Mean More Change, Confusion*, WALL ST. J., July 29, 2002, at B1.

25. Dorf & Sabel, *supra* note 3, at 861-65.

The analysis of statutes and judicial opinions is the core skill; advocacy, litigation, and counseling on issues of legal permissibility are related. The skills in this category are related, to varying degrees, to a libertarian, or at least liberal, political orientation. This orientation suggests that the lawyer's critical role is the protection of citizens against arbitrary state power. Confidentiality and conflict-of-interests norms are central to this orientation.

The second, and less developed, type of skills cultivated by lawyers is associated with transactional practice. Here the emphasis is on construction of frameworks that simultaneously protect separate individual interests and facilitate collaboration. The coercive rules that are the focus of the first type of legal work play an ambiguous background role here, setting both the permissible limits of private discretion and the default rules in the event of ambiguity or relational breakdown. At the forefront of transactional work is a kind of relational engineering that requires both general transactional skills and understanding of the distinctive activities of the parties. In order to serve their clients and those with whom their clients collaborate, transactional lawyers produce customized structures designed to create incentives for mutually beneficial behavior, to constrain opportunism, and to secure fair distribution of rewards.

Although lawyers have been developing these general transactional skills for a long time, scholarship and teaching have only recently begun to take account of them. It is widely believed that, to connect adequately with the world of practice, the legal academy needs to go considerably further in developing scholarship and curriculum focused on transactional practice.

Both these strands of established professionalism have the potential to contribute to community courts. Community courts continue to exercise power; no one suggests that their benign intentions obviate concerns about abuse of power. It makes sense to have a player charged with looking out for the distinctive interests of the defendants. It also makes sense for the occupants of this role to have associations with organizations outside the community court movement that have a special commitment to norms of government accountability and individual fair treatment. To the extent that the contemporary bar has this commitment, its support for drug court lawyers could be a valuable safeguard against oppression and self-entrenchment on the part of such courts. But, as I suggested above, it is a mistake for lawyers to identify this aspect of their role with a limited traditional set of practices of information control and procedural manipulation. They need to be open to the promise of these experiments to develop new modes of accountability and new protections.

Transactional skills could also make a contribution. Community courts create long-term contractual relations with defendants. Lawyers with experience in these contexts should be in a good position to advise, negotiate, and re-negotiate individual deals, and to participate in the refinement of the institution's contractual practices. Moreover, the community court is itself a complex and evolving legal form. Its practices combine adjudication with service provision, and it often works

through subcontracting to private providers. The structuring of these relations calls for skills of a sort that have been central to transactional practice.

V. CONCLUSION

Defenders should give up appraising – and resisting – community courts from the perspective of Warren Court Libertarianism. They have much more convincing and potentially more powerful tools for benefiting their clients in the forms of accountability to which these institutions profess commitment. These skills will require some creative elaboration and development in order to fully realize their potential, but they seem a plausible extension of at least some of the skills traditionally identified with the legal role.