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## Why Defenders Feel Defensive

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## WHY DEFENDERS FEEL DEFENSIVE: THE DEFENDER'S ROLE IN PROBLEM-SOLVING COURTS

Jane M. Spinak\*

The newest version of problem-solving courts has scarcely reached adolescence.<sup>1</sup> Many of these courts remain in the “model” stage, attempting to create a structure and vision that will have a transformative, systemic effect.<sup>2</sup> Others, drug courts in particular, have proliferated across the country and are on the verge of going to scale in many states.<sup>3</sup> Lawyers representing individual clients in these courts are struggling to identify, define and perform their professional duties, at the same time that the courts are being created.<sup>4</sup> To understand why it is a struggle, we need to contextualize the lawyers’ experiences: what is it about the creation of these courts, and the individual representation that follows, that causes lawyers to question whether they are providing ethical and effective representation to their clients?

Few lawyers or judges in criminal and family courts would laud the current court systems.<sup>5</sup> Thousands of litigants stream into these courts daily, to be processed by overworked and underpaid court personnel. The systems are overwhelmingly comprised of the poorest sectors of society and minority communities are vastly over-represented.<sup>6</sup> Recidivism is high. Procedural due process rights are minimized in many states, where defenders have been denied constitutionally

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1. The Dade County, Florida drug court began in 1989, ninety years after the oldest version of a problem-solving court in the United States – the Juvenile Court – was founded. See Arie Freiberg, *Problem Solving Courts: Innovative Solutions to Intractable Problem?*, 11 J. JUDICIAL ADMIN. 8, 12 (2001).

2. See, for example, the National Council of Juvenile and Family Court Judges (NCJFCJ) Permanency Planning for Children Department’s “Model Court Project,” at <http://www.pppncjfcj.org/index.html> (last visited Nov. 18, 2003). The Department’s mission is “[t]o provide an environment for change by supporting and facilitating dependency court teams and by providing education and technical assistance to enable courts nationwide to meet their goals to improve practice in child abuse and neglect cases.” *Id.*

3. By Fall 2002, over 1,200 drug courts were operating or being developed. Aubrey Fox & Greg Berman, *Going to Scale: A Conversation About the Future of Drug Courts*, 39 COURT REV. 4, 4 (2002).

4. I will mostly use the term “defender” when writing about the attorneys who practice in problem-solving courts. The term should be viewed broadly to apply to lawyers representing criminal defendants, juvenile respondents, adults and children in child welfare proceedings.

5. See James Nolan’s description of the current criminal justice system in the first paragraph of his article for this symposium issue. James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1541 (2004). Family Court has had similar discouraging descriptions. See Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 355-358 (2002).

6. See Martin Guggenheim, Commentary, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children Are Entering*

sufficient compensation and, as a result, are unable to provide meaningful and effective assistance of counsel.<sup>7</sup> The outcomes are rarely just or good.<sup>8</sup> As such, some of the problem-solving courts' preeminent supporters find it difficult to understand resistance to trying another way<sup>9</sup> when the advantages to clients have been documented.<sup>10</sup>

William Simon explores this resistance in his essay by analyzing the potential ethical dilemmas that defenders in problem-solving courts may face. While he concludes that "the demands drug courts place on defense counsel do not compromise fundamental ethical commitments of the lawyering role,"<sup>11</sup> he bases that analysis, in part, on some questionable assumptions about both the creation of problem-solving courts and the practices within them.

Problem-solving courts should theoretically be created by the representative stakeholders in the system. For a drug court, for example, this would mean, at a minimum, the prosecution, the defense, the judge, probation and treatment providers. If the problem-solving court is also characterized as a community court, Simon expects that the creation process has "been open to extensive community participation."<sup>12</sup> That, in fact, is a key legitimizing basis for Simon in asking defenders to see problem-solving courts as representative of constitutive community values. Defenders, however, may not experience their role in the creation and execution of the courts as equivalent to the other stakeholders, and therefore may be more resistant to reconsidering the ethical framework for zealous advocacy, including their responsibilities to the community. There are several reasons for this different view.

First, the judges and prosecutors in the partnership begin with an element of financial control that defenders do not have. The judicial or executive branches control the funds used to create the courts. Defenders who believe that creating an alternative system to the current one is the best thing for many of their clients may be reluctant to challenge some of the proposed requirements of the new court,

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*Foster Care?*, 2 U. PA. J. CONST. L. 141, 144-45 (1999); Randolph Stone, *Race and Imprisonment*, 7 U. Chi. L. Sch. Roundtable 127, 127-28 (2000).

7. See *New York County Lawyer's Ass'n. v. New York*, 763 N.Y.S.2d 397, 399-400 (N.Y. Gen. Term 2003). The court noted that failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total per case compensation has created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation in New York City in violation of the New York and United States Constitutions. *Id.* at 400-404.

8. *Id.* at 399.

9. Judith S. Kaye, *Strategies and Need for Systems Change: Improving Court Practice for the Millennium*, 38 FAM. & CONCILIATIONS COURT REV. 159 (2000).

10. William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT. REP. 179, 179 (2002), available at 2002 WL 31308058.

11. William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595, 1597 (2004).

12. *Id.* at 1605.

given the risk of losing the innovation entirely.<sup>13</sup> They can be left with the sense that they have few options but to go along. Other defenders may disagree with the use of precious financial resources for this purpose at all. They may prefer for the traditional adversarial system to be adequately funded (including their compensation) to protect their clients' rights.<sup>14</sup> Further, defenders raise serious questions about funding the courts to provide services to their clients that may be more appropriately funded through other treatment and social services systems.<sup>15</sup> In the family court context, commentators have questioned the shift of resources to the court system, rather than providing families with needed services before judicial intervention.<sup>16</sup> All three of these funding dilemmas color defenders' perceptions of the reform effort.

Second, defenders are less likely to speak with one voice than either the court system or the prosecutors. Within public defender offices, there is frequently disagreement about whether the office is an amalgam of like-minded individuals or an institutional structure with a defined vision.<sup>17</sup> Individual members of a defender office may disagree with an institutional position on an issue as charged as that of the creation of drug courts. Moreover, jurisdictions with public defender or legal aid offices often require access to additional defenders for conflicts or to handle surges in cases. These various defenders within a jurisdiction may have legitimate differences of opinion, which limits consensus about the goals, structure and norms of the new courts.<sup>18</sup> Defenders choosing to participate may feel the lingering resentment of those colleagues who believe the decision is wrong.

Third, defenders have to believe that the other professionals creating the new system are willing to think differently about the clients. This means that prosecutors and judges have to learn more than the simple notion that recovery includes relapse. For a problem-solving court to work, the client has to be viewed as a partner in creating the solution. That requires all the professionals to see the client as more than just a defendant, respondent mother, or a juvenile delinquent. Part of

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13. 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, 57-58 (2000-2001).

14. See *New York County Lawyer's Ass'n.*, for an example of how the current system is underfunded. 763 N.Y.S.2d at 399-400.

15. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. L. & POL'Y 63, 94-96 (2002).

16. Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 444 (2002).

17. Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L. J. 2419, 2420-2422 (1996); see also Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L. Q. 497, 517-526 (2000).

18. As these courts mature, there is increased information about their functioning that may also exacerbate disagreements. Compare Meyer & Witter, *supra* note 10, with the comments of Judge Morris Hoffman regarding disbanding the drug courts in Denver, Morris B. Hoffman, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567 (2004).

the reason that the informal intermediate sanctions used by these courts can be effective is because the person experiencing them has a more complex and respectful relationship with the professionals, including the judge.<sup>19</sup> Defenders also have to believe that this cultural transformation is occurring, even as the rest of the system continues to function as usual. This belief may be hard to sustain when, for instance, consequences for failing in the drug court may be more severe than if the client had never agreed to try.<sup>20</sup>

Finally, defenders worry about the dilution of the problem-solving courts' central commitments as the courts proliferate: can everyone in the system accept such fundamental change or will the innovations resemble earlier reform efforts, which began with lofty ideals but resulted in harsh consequences for clients. The creation of Juvenile Court as an alternative to the adult justice system is the most obvious historical example.<sup>21</sup> The current trend in drug court procedure of requiring a guilty plea or waiver of other due process rights as a condition of entering treatment, rather than permitting the defendant to begin treatment without entering a plea, is one telling change.<sup>22</sup> Such shifts in approach could leave defenders with neither the Warren Court protections that Simon maligns nor the promise of better outcomes for clients that the problem-solving courts extend.<sup>23</sup> Defenders therefore may view the new court paradigm as the least bad alternative rather than the best one, coloring what might otherwise be greater enthusiasm and explaining – to some extent – the defenders' retreat to known norms and standards.

Problem-solving courts are also supposed to be experiential, using the information gathered through its practices continually to improve its structure and outcomes.<sup>24</sup> Defenders, along with the other participants, should be able to shape and reshape the court using empirically sound data. Given the centrality of this experiential component in problem-solving courts, Simon's statement that "[w]hether or not the defendant 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," is surprisingly limiting.<sup>25</sup> Surely defenders would feel more secure in their ethical obligations to their clients generally, if they felt

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19. Robert Victor Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court*, 2 J. CTR. FOR FAM. CHILD. & CTS. 5, 13-15 (2000); see also STEVEN BELENKO, NAT'L CTR. ADDICTION AND SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 25 (2001) (commenting on clients' feeling respected by the judges in the Erie County, Ohio drug court).

20. Quinn, *supra* note 13, at 62.

21. Candace McCoy, in her symposium article, provides another in describing the complex history of determinate sentencing. See generally Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513 (2004).

22. Wendy N. Davis, *Special Problems for Specialty Courts*, 89 A.B.A. J. 32, 36 (2003).

23. Simon, *supra* note 11, at 1598.

24. Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 834 (2000)

25. Simon, *supra* note 11, at 1599. Simon later is less categorical when he states, "Clearly, there is an important role for defense lawyers to play in this debate, both case-by-case and in discussions of general rules." *Id.* at 1601.

that they were having a continuing impact on the nature and structure of the court, rather than just using the data to counsel individual clients. There is little to report that this is happening.<sup>26</sup>

At the point when the court is established and the defender begins to represent individual clients, Simon addresses two issues that he believes most disturb defenders: first, how to counsel a client about whether to submit to the court's jurisdiction and second, how to sustain the distinctive role of the defender in a problem-solving court.<sup>27</sup> Simon is correct that a short-term problem is the newness of this court. As information is gathered and analyzed, lawyers will be able to counsel clients about the court with greater authority. This assumes, of course, that the defender is given the opportunity for meaningful counseling. Some reports suggest that defenders are not given sufficient time to discuss the choices that the clients face.<sup>28</sup> Simon also rightly identifies the additional complexity of counseling a client whose capacity may be limited by addiction,<sup>29</sup> and describes what I agree is an acceptable level of paternalistic counseling that all attorneys practice.<sup>30</sup>

His justification for additional lawyer paternalism in allowing therapeutic manipulation is less persuasive. As the client participates in the court process, she will be faced with therapeutic manipulation as part of the approval and sanctioning process. Simon thinks that the defender can justify allowing this type of manipulation (as long as it does not become abusive) because the client's ultimate autonomy is enhanced. Simon concludes, "Whether the court's program is generally effective will often be the best indication of whether the client's autonomy is in jeopardy."<sup>31</sup> Such generalization is not likely to be sufficient for a defender. They may agree that overall the program is working for clients, and that this knowledge can be incorporated into counseling an individual client. But the defender cannot use this as a basis for silently or actively participating in the sanctioning of an individual client. A more nuanced role is required of the defender, combining, at a minimum, her understanding of the individual client, the client's legal status, the effectiveness of the client's treatment, and the multiple messages the other participants are sending, so that each time the defender can determine, with the client, the appropriate response.<sup>32</sup> Here another of Simon's assumptions may be problematic.

Simon assumes that the defender will be an active participant in the problem-

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26. Quinn, *supra* note 13, at 57, 61.

27. Simon, *supra* note 11, at 1599. I do not address here the confidentiality issue directly.

28. Quinn, *supra* note 13, at 56, 62-63.

29. Simon, *supra* note 11, at 1601, 1602. Simon does not even mention the other limitations that these clients frequently have, including histories of maltreatment, cognitive disabilities, limited education, and other socio-economic disadvantages.

30. Simon, *supra* note 11, at 1602, 1603.

31. Simon, *supra* note 11, at 1603.

32. Defenders may approach their role differently if the court permits the client to submit to its jurisdiction without entering a plea, or if the court will only provide treatment or other services after acknowledging guilt. See Thompson, *supra* note 15, at 74, 81.

solving court, throughout the time the client is subject to the court's jurisdiction, and part of his explanation of how the defender remains a zealous advocate is based on this assumption. Defenders currently practicing in these courts describe a scenario of practice that may belie this assumption. The starkest example is Mae Quinn's description of the defender in the Bronx Treatment Court, who is neither required nor expected to attend the multiple post-plea status hearings the client attends.<sup>33</sup> Quinn notes convincingly that, however zealous advocacy is defined, counsel can neither fulfill her traditional adversarial role nor use the therapeutic or transactional skills that Simon hopes the defender will develop and employ if she isn't there. Nor can she be effective in reshaping the court if she isn't experiencing it daily along with the other participants.

Like Simon, I believe that defenders can be zealous and effective advocates for clients by helping to create and then practice in problem-solving courts. I have even less concern than Simon that defenders can develop the sophisticated interdisciplinary and transactional skills needed in these new courts.<sup>34</sup> And I believe that in some contexts, problem-solving courts will be far more effective in protecting clients' substantive due process rights than the current system has ever been.<sup>35</sup> But for defenders to fully embrace these courts, both they and the rest of the stakeholders need to address some of the concerns I've raised.

First, we need more defenders like Quinn describing their experiences with problem-solving courts, so that a more representative portrayal of defenders' experiences can be analyzed. Neither defenders nor the other court participants can analyze the defender's role with such little information. Second, the other stakeholders in these courts need to be aware of, and responsive to, the defender's more complicated and less equal role in creating and then reshaping the court. At the same time, defenders need to take responsibility for their participation. An example may be helpful. When the first drug treatment part was being established in Family Court in Manhattan, many lawyers for children and adults who practiced in that court did not believe that the court system was being sufficiently inclusive in its planning process, despite requests by these lawyers. Instead of allowing the process to continue as it had been, the lawyers held a public forum for all the potential participants, including a larger array of treatment providers than the court was considering. Many potential stakeholders were able to express their views about the court's creation. Court personnel heard their concerns and began to recognize the importance of their contributions. As a result, later design meetings

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33. Quinn also notes that without increasing the funding for the defender organizations appearing in the treatment part, the defenders are unable to attend regularly. Quinn, *supra* note 13, at 63-69.

34. The best child advocates have learned to do this, and there are excellent examples of children's lawyers who describe the process. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001).

35. Elsewhere I have argued that the structure of problem-solving courts actually provides Family Court judges with greater capacity to protect parents' substantive due process rights in child welfare proceedings, thus justifying some relaxation of the procedural ones. Spinak, *supra* note 5, at 370-374.

were more inclusive and defenders became more effective in communicating their perspectives.

Third, there needs to be a more thorough analysis of when the clients' due process rights are appropriately incorporated into the problem-solving court rather than assuming that these rights get in the way of achieving good outcomes for clients. Defenders may be less willing to modify their advocacy strategies if compelling justification is not established. As an example, two problem-solving court parts were established in Manhattan Family Court at about the same time. One required the parent to admit to neglect and waive most of her procedural due process rights prior to being accepted into the part. The other part did not have all of the same waiver requirements. Both parts have had significantly better outcomes for families than the court in general.<sup>36</sup> But knowing whether the waiver requirements had an appreciable impact on those outcomes would help defenders determine the extent to which modifying their traditional practice norms is either strategically or ethically defensible. Problem-solving courts have a duty to answer these questions through empirical analysis in order to adjust their practices in serving individual clients, and to sustain their legitimacy as part of a larger justice system.

Simon, as usual, has challenged us to stretch our minds in considering the ethical role of lawyers in problem-solving courts. He begins yet another useful conversation that ultimately should provide defenders with the means to secure the most productive results for their clients, and hopefully, for the larger community in which they live.

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36. See Sara P. Schechter, *Family Court Case Conferencing and Post-Dispositional Training: Tools for Achieving Justice for Parents in the Child Welfare System*, 70 *FORDHAM L. REV.* 427, 428, 430, 435 (2001); Wolfe, *supra* note 19, at 11,19.