

# Lawyering and Learning in Problem-Solving Courts

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## INTRODUCTION

In the two decades since the inception of the Dade County (Florida) Drug Court, the modern problem-solving court approach has moved rapidly from the fringes to the mainstream, transforming practice in hundreds of courthouses,<sup>1</sup> encompassing new classes of cases (e.g., domestic violence and crimes committed by those with mental illness) and reshaping conventional criminal courts.<sup>2</sup> These new-model courts offer individuals accused of criminal conduct the promise of one intensive, extended, and transformative interaction with the criminal justice system instead of a lifetime of repeated, brief, and ineffectual encounters. The evidence in support of this approach is slowly mounting, albeit still subject to debate.<sup>3</sup> What is

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1. Robert V. Wolf, *A New Way of Doing Business: A Conversation about the Statewide Coordination of Problem-Solving Courts*, 2 J. CT. INNOVATION 191, 192 (2009) (“By 2004, there were more than 2,500 problem-solving courts in the United States.”).

2. See Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles In Mainstream Courts: Lessons For State Courts*, 26 JUST. SYS. J. 57, 61 (2005) (“Most judges . . . agreed that their own problem-solving court experience enhanced the frequency and effectiveness of their subsequent use of problem-solving principles and practices in conventional courts.”); AUBREY FOX & ROBERT V. WOLF, CTR. FOR COURT INNOVATION, *THE FUTURE OF DRUG COURTS: HOW STATES ARE MAINSTREAMING THE DRUG COURT MODEL* (2004).

3. See ROBERT V. WOLF, CTR. FOR COURT INNOVATION, *EXPANDING THE USE OF PROBLEM SOLVING: THE U.S. DEPARTMENT OF JUSTICE’S COMMUNITY-BASED PROBLEM-SOLVING CRIMINAL JUSTICE INITIATIVE 1* (2007) (“[R]esearch suggested that problem-solving courts, such as drug courts and community courts, had helped decrease recidivism, reduce crime, improve coordination among justice agencies, enhance services to victims, and increase trust in the justice system.”). Wolf works for the Center for Court Innovation, which has been

unmistakable is the reconfiguration of criminal practice that the new approach requires. Along with all other justice system actors (e.g., judges, probation officers), lawyers in problem-solving courts find themselves thrust into new activities and, more importantly, new relationships. Erstwhile adversaries are expected to function as members of a single team with a shared mission.<sup>4</sup> Success in this new practice setting requires lawyers, especially defense attorneys, to reexamine and replace some of their most deeply ingrained habits of mind and action. Clinical teachers have an important responsibility to translate these fundamental changes in the world of practice into the law school curriculum, providing students with an opportunity to both learn and test the new approach.

Many defense attorneys, including several clinician-scholars, have resisted these changes, seeing in them an existential threat to the role of defense counsel. Arguing that the new paradigm confuses, marginalizes, and essentially silences lawyers,<sup>5</sup> these critics claim

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instrumental in developing and advocating for the problem-solving model. The Center's analysis is nevertheless credible, even though not conclusive, finding support in and acknowledging unbiased and even self-consciously skeptical researchers. *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 (2005); STEVEN BELENKO, NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 1 (2001) ("Drug use and criminal activity are relatively reduced while participants are in the program. Less clear are the long-term post-program impacts of drug courts on recidivism and other outcomes."). *But see* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 66-67 (2009) (detailing limitations of this effectiveness research).

4. *See, e.g.*, MICHAEL THOMPSON, FRED OSHER & DENISE TOMASINI-JOSHI, IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT 8 (2007) ("The mental health court team works collaboratively to help participants achieve treatment goals . . . . Team members should work together on each participant's case and contribute to the court's administration to ensure its smooth functioning."); NAT'L ASSOC. OF DRUG COURT PROF'LS, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 3 (1997) ("Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.")

5. *See, e.g.*, Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis Of Legitimacy*, 57 SMU L. REV. 1459, 1482-83 (2004); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 93 (2007); 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, 55-56 (2000-2001). Some prominent defenders have played a significant role in developing and promoting the new model. *See, e.g.*, Lisa

that the new courts deprive defendants of an essential layer of protection. The National Association of Criminal Defense Lawyers (NACDL) recently published a report based on two years of task force hearings into problem-solving court practice around the country.<sup>6</sup> Like the scholarly literature that it cites, the report raises legitimate concerns over many features of these courts, including eligibility standards, sentencing practices, and differential access among racial and ethnic groups to the benefits the courts offer.<sup>7</sup> Relatively sanguine about mental health courts,<sup>8</sup> the NACDL Task Force thoroughly repudiates drug courts, calling for their abolition. In its assessment of problem-solving court practice, the NACDL Report, like much of the literature that preceded it, reflects a rigid adherence to a narrow conception of the attorney's role in criminal proceedings—that of the steadfast, combative, and protective champion. This Article calls on clinical law teachers to play a critical mediating role in redefining the practices—and the identity—of defense attorneys within these new courts, while preserving the values that underlie the traditional role. Precisely because of their long-standing collaboration with the defender community, clinics working in problem-solving courts can help advance defenders' concerns while opening them up for analysis and testing at the same time that they subject problem-solving justice to equally rigorous scrutiny.

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Schreibersdorf, *A Public Defender in a Problem-Solving Court*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 401, 409 (Marjorie A. Silver ed., 2007). Likewise, Professors Bruce Winick and David Wexler, pioneers in the development of therapeutic jurisprudence, have adapted that approach to the specific issue of the defender's role in problem-solving courts. See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055 (2003); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 *ST. THOMAS L. REV.* 743 (2005).

6. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 8–9 (2009) [hereinafter *NACDL REPORT*]. The transcripts of these hearings, which are cited frequently in this Article, can be viewed at *NACDL Problem-Solving Task Force: Hearings Transcript*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, <http://www.nacdl.org/drugcourts> (follow "Hearings Transcript" hyperlink) (last visited Nov. 2, 2010) [hereinafter *NACDL Hearings*].

7. *NACDL REPORT*, *supra* note 6, at 13 ("Too often it seems that drug court eligibility and admission criteria serve to exclude mostly indigent and minority defendants. Drug courts must address these fundamental and disturbing disparities.").

8. *Id.* at 50–52.

With a clearly expressed commitment to continuous improvement, the modern problem-solving court movement invites such scrutiny and distinguishes itself from similarly ambitious but less well-conceived efforts in the past.<sup>9</sup> Alongside the controversial team approach, problem-solving court advocates have articulated a commitment to collecting data and analyzing outcomes.<sup>10</sup> Many proponents of the model recognize the inadequacy of mere good intentions<sup>11</sup> and the necessity of an effective feedback system. To take but one example, at roughly the same time that NACDL published its critical report, the Center for Court Innovation, the intellectual and policy nerve center of the problem-solving court movement, published an article raising concerns over unequal access to problem-solving courts for defendants of different racial and ethnic groups.<sup>12</sup> This reflects a self-critical design and a level of responsiveness without parallel in earlier experiments with problem-solving courts and rarely seen within the traditional justice system.<sup>13</sup>

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9. The juvenile court is an obvious and oft-cited precursor to modern problem-solving approaches. See Casey, *supra* note 5, at 1464 (“In many ways, the juvenile courts were the original problem-solving courts . . .”). Mae Quinn has uncovered and examined a hitherto “forgotten history” of similar reform, the mid-twentieth century efforts of Anne Moskowitz Kross to establish specialty courts in New York City. Quinn, *supra* note 3, at 69–80.

10. ROBERT V. WOLF, CTR. FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 8 (2007) (“The active and ongoing collection and analysis of data—measuring outcomes and process, costs and benefits—are crucial tools for evaluating the effectiveness of operations and encouraging continuous improvement.”).

11. The juvenile court experience stands as one example of the necessity of close scrutiny even when designers of an alternative model of adjudication profess benevolent intent. See *In re Gault*, 387 U.S. 1, 17–18 (1967) (“Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice . . . the results have not been entirely satisfactory.”). Not all modern problem-solving court proponents have internalized these lessons, lapsing, self-parodically, into the Juvenile Court’s sorry history of reform by euphemism. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 470 (denying the seemingly indisputable coercive nature of even short-term incarceration: “Smart punishment is not really punishment at all, but a therapeutic response to the realistic behavior of drug offenders in the grip of addiction.”).

12. Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT’L BLACK L.J. 27 (2009).

13. In important respects, the most thoughtful proponents of problem-solving courts have internalized the most forceful criticism of their forerunners and have charted the course of “better informed, more balanced, and truly thoughtful discourse” that leading opponents have demanded. Quinn, *supra* note 3, at 81–82.

This commitment to self-assessment ought to attract the activities of clinical law teachers, who have built their pedagogy upon the premise that students can best understand, assess, and transcend the assumptions ingrained within the practice of law and the administration of justice through engaged and reflective participation in both.<sup>14</sup>

Part I of the Article introduces the core principles and practices of problem-solving courts, including the reconfigured roles of judges and lawyers. This is followed by a focused examination of the heated rhetorical<sup>15</sup> battle regarding the fate of the traditional image of defender-as-champion in this new paradigm. The testimony given to the NACDL Task Force as to what is actually happening in courts across the country exposed a gap between the concerns expressed by many defenders and the actual experiences of defendants and their lawyers in such courts. The Author's observations of problem-solving practice, made in preparation for launching a Mental Health Court Clinic<sup>16</sup> and reported in pertinent parts within, likewise belied many of the concerns of problem-solving court opponents. Part I concludes by offering an alternative vision for defenders in problem-solving courts: counsel as advocates within an inter-disciplinary network. The networked lawyer does not always speak with the tone or language of a traditional champion, but she does not compromise the interests of clients or her own sense of personal and professional accomplishment. In fact, it is only through learning a new language of influence that today's defenders can establish for themselves a

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14. Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984) (tracing development of clinics to recognition that traditional legal pedagogy “failed to develop in students ways of thinking within and about the role of lawyers”); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 138 (1993–1995) (“By examining role characteristics, we grasp those aspects of a role that powerfully shape our own understanding and behavior.”).

15. This contest is not merely rhetorical. In 2009, the Maryland Public Defender argued that the Baltimore City Adult Felony Drug Treatment Court's operation violated separation of powers and due process concerns. *Brown v. State*, 971 A.2d 932 (Md. 2009). The court did not squarely address either issue in denying the particular petitioner's challenge.

16. In the Spring of 2010, Seattle University School of Law opened its Mental Health Court Clinic, in partnership with Associated Counsel for the Accused, a non-profit public defense firm. For a more complete description of this court, see ERIC TRUPIN ET AL., CITY OF SEATTLE MUN. COURT, MENTAL HEALTH COURT EVALUATION REPORT (2001), available at <http://cityofseattle.net/courts/pdf/MHReport.pdf>.

position of importance comparable to that which they have long held in conventional courts.

Part II maps the path toward greater and more effective participation by law school clinics in problem-solving courts. Clinics and problem-solving courts each stand as an alternative to a deeply entrenched institution. Each has achieved a degree of mainstream acceptance<sup>17</sup>, and they reveal seemingly complementary animating spirits. Nevertheless, problem-solving courts and law school clinics have surprisingly little shared history.<sup>18</sup> This Article will examine the application of core principles and methods of clinical teaching to this new setting. Like the defenders confronting the changing rules of practice, clinicians will need to modify, refine, and perhaps even abandon familiar methods. However, through principled adaptation, clinicians can better prepare students for this expanding field of practice and also help redesign the field, holding the system accountable and demonstrating the distinctive contributions that reflective, resourceful defenders can play.

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17. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 34–43 (2007). This landmark work calls for greater integration of the clinical and traditional approaches and highlights two schools (City University of New York and New York University) that have succeeded in doing so.

18. The website of the Center for Court Innovation contains a list of law school courses, clinical and otherwise, that are related somewhat to problem-solving justice. *Law School Courses in Problem-Solving Justice and Related Topics*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/index.cfm?fuseaction=document.listDocument&documentTopicID=31&documentTypeID=10> (last visited Nov. 30, 2010). The Conference of Chief Justices of State Court Administrators has issued a call for far more curricular reform along these lines. *Resolution 22: In Support of Problem-Solving Principles and Methods*, CONFERENCE OF CHIEF JUSTICES, 3 (July 29, 2004), <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf> (calling on the Association of American Law Schools to “support expanded education by their members on the principles and methods of problem-solving courts”); see also Symposium, *The Judicial Perspective*, 29 FORDHAM URB. L.J. 2011, 2018 (2002). In this panel discussion, Judge William Schma urged legal educators

to get past the stage where therapeutic jurisprudence and those kinds of things are simply seminar courses that a few goofballs take because they don’t want to take some other seminar course. These have to be part of the traditional role of raising lawyers so that it becomes a part of their self-concept and they understand how they fit into the social system.

*Id.*

## I. PROBLEM-SOLVING COURTS: TOWARD A NEW FORM OF JUSTICE

*A. The Vision*

Problem-solving court proponents “seek to use the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities.”<sup>19</sup> Because the modern problem-solving court movement emerged as a response to the handling of drug crimes, the drug court model serves as a useful template for describing the basic framework. Generally, courts have processed cases involving drug-related crimes (e.g., possession of illegal drugs or offenses, such as theft, committed to support a drug habit) in substantially the same manner as other criminal cases. Most defendants pled guilty, often fairly quickly, and were placed on probation or in prison. Because neither the probationary nor prison sentences addressed the underlying substance abuse problem, defendants would emerge from the process no better equipped to avoid further criminal behavior than they entered it. The system’s inadequacy, perhaps even toxicity, prompted one judge to caustically observe, “You know, I feel like I work for McJustice: we sure aren’t good for you, but we are fast.”<sup>20</sup>

In a problem-solving drug court, defendants are assessed to determine whether their alleged criminal conduct was linked to untreated substance abuse. In exchange for the opportunity to receive treatment as part of the process of resolving their criminal case, defendants are required to submit to an extended period of judicial supervision during which interim sanctions (including short jail stays) may be imposed or rewards could be granted. Those who succeed have their charges reduced or dismissed or their convictions vacated.

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19. Panel Discussion, *What Is A Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 78 (2000) [hereinafter Panel Discussion]; see also COUNCIL OF STATE GOV’TS JUSTICE CTR., MENTAL HEALTH COURTS: A PRIMER FOR POLICYMAKERS AND PRACTITIONERS 8 (2008) (“They seek to use the authority of the court to encourage defendants with mental illnesses to engage in treatment and to adhere to medication regimens to avoid violating conditions of supervision or committing new crimes.”).

20. Minnesota Supreme Court Justice Kathleen Blatz shared this now-famous observation, which she attributed to a colleague. Panel Discussion, *supra* note 19, at 80.

Failure, if prolonged or severe enough to warrant termination from the program, results in traditional sanctions.<sup>21</sup>

The introduction of the problem-solving drug court was more a matter of pragmatic improvisation than methodical theoretical design.<sup>22</sup> In time, this innovation and the political movement behind it became enmeshed with the developing theory of therapeutic jurisprudence.<sup>23</sup> The central premises of therapeutic jurisprudence are that interactions with the justice system necessarily have an impact on an individual's psychological or emotional well-being and that the system should be designed to minimize emotional or psychological harm and maximize benefit to the extent possible consistent with other system objectives.<sup>24</sup> Viewed in this light, the traditional handling of drug-related cases amounted to a significant missed opportunity for personal transformation and community improvement.<sup>25</sup>

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21. The NACDL Report demonstrates that, in many instances, treatment court participants who fail to change their behavior ultimately receive harsher sanctions than defendants who opt to remain in conventional courts and never even attempt treatment. NACDL REPORT, *supra* note 6, at 29. This imbalance is in no way inherent in the design or concept of problem-solving courts and ought to be eliminated, as NACDL suggests.

22. See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 945 (2003) ("Is there any justification for choosing experimentalist courts rather than experimentalist agencies? The short answer, as with other broken institutions, is necessity. As a matter of first principle, there will often be no good reason to prefer problem-solving courts to problem-solving agencies; in fact, the latter may be the more appropriate tool. However, politics and legislative inertia will often prevent the creation of an appropriate agency—which leaves courts to fill the gap."); see also Panel Discussion, *supra* note 19, at 80 (quoting D.C. Superior Court Judge Truman Morrison: "In very large measure, this is happening because of the abject failure of the other branches of government."); Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507, 511 (2005) (defending mental health court as "a pragmatic solution that I favor over the alternative, the criminalization of mental health problems"). For a more cynical view of the origins of the modern movement, see Quinn, *supra* note 3, at 63 (asserting that the movement began because court leaders needed to eliminate jail overcrowding).

23. See Winick, *supra* note 5, at 1090 (describing a "symbiotic relationship" between the concepts); see also Hora et al., *supra* note 11; JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 47, 187 (2001) (arguing that a therapeutic orientation attunes problem-solving justice with a dominant strain in modern American culture). But see GREG BERMAN ET AL., GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 51–52 (2005) (observing that there is "not a perfect fit" between the two approaches).

24. See LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); Winick, *supra* note 5, at 1081–82.

25. Winick, *supra* note 5, at 1081 ("The individual's arrest and need to face criminal charges can present the pressures needed to create such a teachable moment or therapeutic



The extent to which this therapeutic orientation has come to define the problem-solving approach<sup>26</sup> is evident from this reflection from a defense attorney practicing in a mental health court (i.e., a court addressing crimes allegedly committed by the mentally ill):

Recently, the judge, the social worker, the assistant district attorney, and I discussed with each other and with the client her need for hospitalization. She was so depressed that she did not have the strength to take her medication as the judge had ordered. The kindness and compassion that were expressed towards this woman stood in stark contrast to what would be more likely to occur in another courtroom—the shackling of a client and removal of that person to jail for failing to comply with the judge’s directive.<sup>27</sup>

A close look at this description reveals the extent to which problem-solving justice reorients the judicial process. The comment focuses on the client’s “need” and the professionals’ goodwill (i.e., their “kindness and compassion”). There is no discussion of the defendant’s guilt or the lawyers’ (or judge’s) analysis. The verbs used—specifically, “discussed” and “expressed”—describe activities more closely associated with a therapist’s office than a courtroom, such as the hypothetical courtroom that the defender invokes for contrast, in which the primary issue is the defendant’s action (or failure to act) and in which the judge wields power bluntly, constrained to do little but order merciless (or at the very least, dispassionate) shackling.<sup>28</sup>

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opportunity in which the individual is ready to contemplate change, accept responsibility for wrongdoing, and consider making a genuine commitment to rehabilitation.”).

26. As this therapeutic orientation is central to distinguishing problem-solving courts from conventional ones, this Article will focus on courts addressing conditions, such as substance abuse or mental illness, which are commonly conceived of as treatable. The Article will not discuss the applicability of problem-solving approaches (or even the label) to other specialty courts, such as those involving domestic violence, which the NACDL Report sharply denigrates with the label “problem-shifting.” NACDL REPORT, *supra* note 6, at 15.

27. Schreibersdorf, *supra* note 5, at 409.

28. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1618–21 (1986).

*B. Problem-Solving Judging: Performing Authority*

The fusion of justice and therapy in problem-solving courts has altered the roles and relationships of all participants. As put in its strongest form by two drug court proponents, “[t]he drug offender becomes a client of the court, and judge, prosecutor, and defense counsel must shed their traditional roles and take on roles that will facilitate an offender’s recovery from the disease of addiction.”<sup>29</sup> Seeing a defendant as “a client of the court” marks a radical change from the traditional notion of the judge as a “detached, neutral referee.”<sup>30</sup> The “client of the court” label also connotes a consumerist understanding of the defendant’s experience which further situates problem-solving courts within the “dominant strain(s)”<sup>31</sup> of modern American culture. The defendant, the person whose alleged unlawful actions have given rise to the proceedings, can assert a legitimate expectation of receiving services from the process.

Judges in these courts do not spend much time performing traditional judicial tasks, such as finding facts and interpreting law.<sup>32</sup> Instead, they “verify that the exhaustive information on the progress of each defendant . . . comports with [their] own perception and . . . ritualize the imposition of graduated rewards or punishments.”<sup>33</sup> Instead of assessing contested stories from competing parties, the judge typically receives a consensus report from the court “team.”

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29. Hora et al., *supra* note 11, at 469; *see also* BERMAN ET AL., *supra* note 23, at 33 (“[Problem-solving courts] ask judges and attorneys to do more than just apply the law correctly . . . . [They must] broaden their scope to see the real-life consequences of courtroom decisions.”); Dorf, *supra* note 22, at 980 (“[Problem-solving courts] point the way toward an understanding of the legal process as the collective search for practical solutions.”).

30. Hora et al., *supra* note 11, at 469; *see also* BERMAN ET AL., *supra* note 23, at 80 (“We’re no longer the referee or the spectator. We’re a participant in the process.”).

31. *See* NOLAN, *supra* note 23.

32. Dorf, *supra* note 22, at 940 (“[A]lmost no decision made by a problem-solving court requires the application of unguided judgment. . . . There is very little judging in the sense of making a non-mechanical decision.”). *Contra* Shaubin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 104 (2007) (“[M]ental health court judges are not acting as impartial arbiters, but as dynamic risk managers.”). Talesh and Dorf may both be correct, at least in part, with the divergence in their descriptions (i.e., “mechanical” versus “dynamic”), indicating how novel and still somewhat elusive this new model of judicial activity is.

33. Dorf, *supra* note 22, at 940.

The report offers a summary of the participant's performance since he or she was last before the court. It is this report, produced through the pre-hearing staffing process, described more within, that the judge must verify when he or she encounters the "client" herself. This verification is not merely a matter of establishing or checking facts. Indeed, the judge's task is more complex, not readily discernible by clear proof nor reducible to a conclusive articulation. The judge is essentially assessing the person's commitment to and capacity for transformation, something that neither legal education nor judicial experience necessarily prepares the judge to do. Assuming the judge determines that the team's report has accurately charted the participant's compliance, the judge's task is to communicate with the participant in a way that induces the desired future behavior (specifically, consistency for those who are succeeding, and change for those who are struggling).

"Hearing" is an inadequate term for these court encounters, as it suggests the traditional judicial function of receiving information and argument. Having surveyed drug courts around the country, James Nolan has demonstrated how judges self-consciously employ the metaphor of theater to describe their activity, with an emphasis on projecting a message rather than reaching a decision.<sup>34</sup> Each encounter with a participant is an episode with significance for the individual participant before the court, as well as the rest of the audience, i.e., the entire community of participants present in the courtroom. One judge has described a day's work as "orchestrated.

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34. NOLAN, *supra* note 23, at 61 (quoting Judge Jamey Weitzman: "Drug courts, it has been said many times, are theater. And the judge is the stage director and one of the primary actors."); *id.* at 70 ("[D]rug court judges very consciously conceive of the drug court as theater."). Both proponents and opponents of the courts confirm this observation. *See* BERMAN ET AL., *supra* note 23, at 69 (describing how a community court judge who masked his skepticism about defendant for dramatic effect engaged in "a form of public theater aimed at the broader audience in the courtroom and the community at large"); NACDL REPORT, *supra* note 6, at 71 n.352 (quoting testimony of Tim Murray, Executive Director, Pretrial Justice Institute: "Unfortunately, one of the aspects of drug court, undeniably, is the element of theater. It's a big part. We didn't realize it when we started, but the drug courts are great theater."); Winick, *supra* note 5, at 1060 ("Not only is the judge a leading actor in the therapeutic drama, but . . . the judge also assumes the role of director, coordinating the roles of many of the actors, providing a needed motivation for how they will play their parts, and inspiring them to play them well.").

It's a show. You are putting on a show."<sup>35</sup> Another advises colleagues to shape their calendars "as you would a play, with a beginning, a middle, and an end."<sup>36</sup> Unlike the jumble of unrelated and haphazardly sequenced events one might see in a traditional courtroom, "the drama should flow in such a way that offenders/clients are conveyed a certain narrative that contains a central message."<sup>37</sup>

The judge may be, as Bruce Winick has written, both the "leading actor" in this drama and the "director" as well,<sup>38</sup> but as in a theatrical production, the director's vision and the star's portrayal build upon the prosaic, often unseen, efforts of others. Problem-solving court judges can exercise artful directorial control over their calendars because of the work done in the pre-court meetings, events that have no analog in conventional courts. At these meetings, representatives of the court (judge, probation officers, and other court services personnel), lawyers for the state and the defendant/participant, and affiliated treatment providers share information about each participant and discuss what action the court should take.<sup>39</sup> Options range from termination (with traditional punishment) to successful discharge or, as it is often termed, "graduation."<sup>40</sup> Most of the time, of course, the team must address the broad array of options in

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35. NOLAN, *supra* note 23, at 71.

36. *Id.* at 70. This judge goes on to advise that it is beneficial to start the calendar with the cases of participants who have not performed well, so as to communicate the consequences of noncompliance to other clients in the audience. *Id.*

37. *Id.*; see also Bruce Winick & Ken Kress, *Special Theme: Preventive Outpatient Commitment for Persons with Serious Mental Illness*, 9 PSYCHOL. PUB. POL'Y & L. 107, 126 (2003) ("Not only does the individual benefit from these sessions, but so does the audience in the courtroom, which typically includes other mental health court participants in various stages of treatment and processing, who may be experiencing similar problems."). The notion that a "message" or line of meaning ties together a string of events is one of the central insights of narrative lawyering theory, an important vein of clinical legal scholarship. Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 4-9 (2005).

38. Winick, *supra* note 5, at 1060.

39. On this point, Nolan, who generally assumes a non-ideological stance with regard to the existence and operation of problem-solving courts, suggests a somewhat sinister undertone: "In the backstage, practitioners conspire about how best to make the courtroom theater communicate a particular message to clients and others in the courtroom audience." NOLAN, *supra* note 23, at 62.

40. See NACDL REPORT, *supra* note 6, at 18 (describing range of options).

between. Should the participant receive additional services? Is some intermediate sanction necessary? Should previously imposed restrictions be eased as a reward for progress toward treatment goals?

Often, the judge plays a fairly subdued role in the team meetings, truly one among equals, and in some courts, such as Seattle's Municipal Mental Health Court, judges are not even present, leaving the other team members to develop the facts and, if possible, arrive at an agreed solution. As described later, achieving effectiveness within this consensus-seeking process while preserving fidelity to the client is perhaps the most significant challenge defenders face in this new milieu. The participants themselves are not allowed to appear at or observe the team meetings. In court, by contrast, the judge-participant dyad receives the spotlight,<sup>41</sup> with the judge assuming whatever role—"confessor, task master, cheerleader, and mentor"<sup>42</sup>—seems most likely to motivate that participant at that moment. This celebration of judicial engagement, energy, and flexibility<sup>43</sup> suggests an imbalance in this central relationship of the problem-solving court, with the participant as a somewhat subordinate figure in his or her own life, driven by "[t]he desire to please the judge or avoid the judge's disappointment or anger."<sup>44</sup> Paradoxically, the centrality of the judge-participant relationship highlights the extent to which the efforts of problem-solving court judges (and all other court professionals) are dependent upon the participants, i.e., the clients, for validation. As drama replaces contest as the controlling courtroom metaphor, the grounds for evaluating the legal system, and the judges who prominently represent it, are changed. A traditional judge can approach (and retrospectively defend) a difficult decision based on its fidelity to precedent and/or the record of historical fact that was developed in court. By contrast, problem-solving justice, with its

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41. See Stefan & Winick, *supra* note 22, at 521 ("The judge-participant interaction at these periodic hearings is an essential component of the court process.").

42. JEFFREY TAUBER, CAL. CTR. FOR JUD. EDUC. & RES., *DRUG COURTS: A JUDICIAL MANUAL* 5-6 (1994).

43. Stefan & Winick, *supra* note 22, at 521 ("The hearing becomes an exercise in creative problem solving in which the judge and other members of the treatment team attempt to resolve difficulties and overcome obstacles that have arisen in the treatment process.").

44. Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 *PSYCHOL. PUB. POL'Y & L.* 587, 597 (2005).

therapeutic and consumerist foundation, seeks affirmation in the future, in the form of participants' personal transformations. The ultimate measure of a judge's performance will lie in participants' collective response to the judge's combination of encouragement, inspiration, and sanctions.

### *C. Lawyers in Problem-Solving Courts: Defining a Role*

#### 1. Confusion

Unlike judges, defense attorneys did not play a major role in creating the problem-solving court model, and they have struggled to define their place within it.<sup>45</sup> In the courts that he observed, Nolan found defenders to be absent or ineffectual.<sup>46</sup> A more recent case study of an Arizona drug court found that although prosecutors had opted for a reduced role, defense attorneys ranked among "the most central players"<sup>47</sup> in the process. One New York drug court judge has described, with evident approval, seeing defense attorneys "agreeing that maybe a few nights in jail would be just the thing to make sure that their client stays clean."<sup>48</sup> Berman and Feinblatt, two of the most

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45. Quinn, *supra* note 5, at 64.

46. NOLAN, *supra* note 23, at 40 ("[L]awyers generally play a less prominent role. 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."); *id.* at 51 ("[P]sychologists and other treatment providers play a dominant role in the drug court drama, often a role more pronounced than that of the attorneys.").

47. Salmon Adegboyega Shomade, Case Study of the Structures of Criminal and Drug Courts 220 (Oct. 9, 2007) (unpublished Ph.D. dissertation, University of Arizona), available at [http://etd.library.arizona.edu/etd/GetFileServlet?file=file:///data/pdf/etd/azu\\_etd\\_2381\\_1\\_m.pdf&type=application/pdf](http://etd.library.arizona.edu/etd/GetFileServlet?file=file:///data/pdf/etd/azu_etd_2381_1_m.pdf&type=application/pdf).

48. Symposium, *The Impact Of Problem Solving On The Lawyer's Role And Ethics*, 29 FORDHAM URB. L.J. 1892, 1893 (2002) [hereinafter *Impact*]. In this same passage, the judge offered observations of corresponding adjustments by prosecutors. *Id.*; see also Fidler, *supra* note 44, at 599 ("The public defenders learned that the District Attorney's Office was willing to take chances on individual defendants and not opt for easy convictions or punitive sentences if an assessment showed that appropriate treatment and supports could help a defendant live responsibly in the community."); BERMAN ET AL., *supra* note 23, at 37 (referring to both defense and prosecution attorneys as members of a single class and asserting that "[f]or drug-court attorneys, the measure of success has become not whether they win or lose the case, but whether they are able to change the dysfunctional behavior of addicted offenders and reduce recidivism"). This description, like that in the text accompanying *supra* note 44, relegates drug court participants to a subordinate role in which they are acted upon, monitored, motivated, or

prominent researchers in the field and strong supporters of problem-solving courts, likewise explain how “when a drug-court judge hands down a three-day jail sentence because an addict has failed to attend his treatment program, defenders are often surprisingly silent because they—and their clients—have already accepted the idea of intermediate jail sanctions as part of the treatment sentence.”<sup>49</sup>

Such silence need not be interpreted as abdication. A judge with experience in a problem-solving court has rejected the “false dichotomy” between problem-solving justice and engaged defender advocacy.<sup>50</sup> Even the New York judge quoted above describing attorneys agreeing to sanctions has exhorted defense counsel to remain vigilant: “[L]awyers have to remember that they do not stop being advocates in problem-solving courts. In fact, quality lawyering matters, and it is crucial in these courts. . . . The challenge for defense lawyers is to take care that cooperation does not turn into capitulation . . . .”<sup>51</sup> A defense attorney told a panel exploring this subject, “I do not believe that the role of the defense attorney has to change in a treatment court. I do not think that we have to be altered in our perception of what our role is. . . . I think it is more important that we speak for our client.”<sup>52</sup> Daniel Richman has attempted to mark the appropriate balance by advising defenders to “strive to play the facilitative role necessary for therapeutic collaboration” while remaining ready to “embrace [their] inner Lord Brougham.”<sup>53</sup> As described in the next section, this vision has not been well received in certain influential sectors of the defender community.

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even intimidated, rather than a position of agency, in which their decisions determine their own fate and the fate of the program.

49. *Id.* at 86. For an outraged response to such practices, see Morris B. Hoffman, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567, 1567 (2003) (decrying “the conspiracy of silence by the defense bar”); Symposium, *How Does the Community Feel About Problem-Solving Courts?*, 29 FORDHAM URB. L.J. 2041, 2057 (2002) (calling such practices a “corruption of the constitutional role of the lawyer”).

50. Symposium, *The Judicial Perspective*, 29 FORDHAM URB. L.J. 2011, 2021 (2002) (arguing it is incorrect to say “that we can have an adversarial system or we can have thoughtful dispositions and outcomes, but we cannot have both”).

51. *Impact*, *supra* note 48, at 1894.

52. Symposium, *The Birth of a Problem-Solving Court*, 29 FORDHAM URB. L.J. 1758, 1775 (2002).

53. Daniel Richman, *Professional Identity: Comment on Simon*, 40 AM. CRIM. L. REV. 1609, 1614 (2003).

## 2. Resistance: A Battle over Lawyers' Place and Power

Problem-solving court practice unsettles a powerful professional identity for defenders: that of the client's sole and resolute champion. This self-image has attracted many lawyers to and sustained<sup>54</sup> them in their vocation as defenders of the accused. In the conventional model of criminal justice, client and attorney form a team of embattled underdogs confronting the power of the state. Joining the problem-solving court team entails sharing goals, functions, and interactions with other team members, some of whom represent the institutions against which the defense has traditionally battled against.

This Part examines three related strands of the opposition that defenders, including some clinicians,<sup>55</sup> have raised in response to these changes: (1) the weakening of the lawyer-client relationship; (2) the erosion of attorney control over the client's information; and (3) the suppression of advocacy. The following Part demonstrates how defenders can preserve their traditional values, though not their rhetoric and strategies, within this new environment.

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54. On the motivations driving public defenders, see Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993). William Simon has provocatively marked the distance between lawyers' professional/personal fulfillment in their role and the interest of clients in obtaining better results than those available in the traditional courts, remarking that "[w]hether or not the defender is better off with the advent of the drug court, the lawyer's role remains to help [the client] make the choice that best serves his interests among the options open to him." William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595, 1599 (2003).

55. See Meekins, *supra* note 5, at 91 (arguing that problem-solving practices are "at odds with the notion of zealous advocacy that underpins the widely understood role of defense lawyers"); see also Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 579 (2007) ("[D]efense counsel would do well to challenge the court's existence rather than merely advise clients that entering the court's program presents a risk."). Clinicians are certainly not alone in generating scathing critiques. See, e.g., Stefan & Winick, *supra* note 22, at 511. Stefan, a long-time advocate for the mentally ill, asserts that "[t]he creation of mental health courts to solve the problems represented by people with psychiatric disabilities in the criminal justice system is similar to an unhappy teenager deciding to have a child to solve her problems." *Id.*



a. The Fundamentals of Defense: Correct Posture

In the role of champion, a defender seeks to erect a “protective barrier”<sup>56</sup> between the client and all other actors. Effectiveness flows directly from exclusivity. No other actor—least of all the judge—has unmediated access to the client’s thoughts. Aligned *with* the client, the defender’s default posture is to stand *against* all others.<sup>57</sup> The exclusivity of the lawyer-client relationship is the foundation for a distinctly powerful and often hard-won bond. Defenders often overcome a client’s initial distrust by asserting and then demonstrating that the client is the only person the lawyer cares about and that the lawyer is the only person in the process wholly committed to the client.<sup>58</sup> This passionate, unidirectional commitment has long emboldened defenders to remain steadfast against the powerful forces seeking to convict their clients. In an updated version of Lord Brougham’s famous formulation, Florida attorney Barry Wax offered these reminiscences to the NACDL Task Force on Problem-Solving Courts, “When I was a young public defender that was the best job I ever had in my life. You know, you tried your cases and you knew that you could bring that court to a halt.”<sup>59</sup> One defender has described his mission in traditional courts as protecting clients from “destructive justice.”<sup>60</sup> These comments reflect a vision, shared by many defenders, in which they stand outside the process, deriving satisfaction from the outlaw-by-proxy status they assume when they

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56. Casey, *supra* note 5, at 1497.

57. Even in a conventional court, defenders cannot serve their clients adequately if they persist in an oppositional posture at all times. See Quinn, *supra* note 55, at 565 (“[G]ood criminal defense attorneys have long recognized their job calls for them to wear any number of hats throughout the course of a given case, not just that of trial lawyer or dogged adversary.”).

58. The film CRIMINAL JUSTICE captures this quite well in a scene in which a public defender tells his client in the cellblock, “Jessie, the only person I care about here is you. I don’t [care about the victim, judge or DA.] They’re not my . . . client.” CRIMINAL JUSTICE (Home Box Office 1990).

59. Miami, Florida Hearings, NACDL Hearings, *supra* note 6, at 184. Even Jim Neuhard, a prominent advocate for the defender community who has demonstrated an openness to some aspects of problem-solving courts, worries about “losing the ability to say the emperor has no clothes.” Panel Discussion, *What does it Mean to be a Good Lawyer?: Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 206, 211 (2001).

60. *Id.* at 208–09.

stand up for those who are accused of crime. The opportunity to join the court team—becoming identified with and somewhat responsible for the process—is, from this perspective, an invitation to surrender, or at the very least, to forfeit something of great value.

Timothy Casey, defender and clinician, decries the loss of exclusivity and primary responsibility for the client's fate when "problem-solving courts . . . remove the attorney from the process."<sup>61</sup> Defense attorneys are literally present,<sup>62</sup> but they are no longer the distinctive protective and potentially disruptive force described above. Problem-solving court defendants must interact directly with a range of others who share responsibility for their success. Tamar Meekins, another defender-turned-clinical teacher, laments the devaluing of the attorney-client relationship that results when "the non-legal team members may have greater interaction with, or develop a closer relationship to, the defendant than the defense attorney."<sup>63</sup> Like Casey, Meekins sees defense counsel without "a functional representational role"<sup>64</sup> in problem-solving courts. Meekins identifies an equally grave danger in the relationships that the defender, supplanted from primacy in the client's eyes, is likely to develop with other court actors: "[T]he defender's ability to represent her client might be materially limited because of the lawyer's personal interest in maintaining professional relationships with other members of the team."<sup>65</sup>

In theory, de-centering the defender-client relationship need not devalue it. However, both the rhetoric and the reality of the turn toward problem-solving courts provide ample grounds for defenders to feel targeted for elimination. Nolan quotes a drug court judge pejoratively referring to traditional, i.e., aggressive/protective,

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61. Casey, *supra* note 5, at 1498.

62. Problem-solving courts that proceed without counsel are plainly illegitimate. However, this is a defect of implementation, not conception, akin to the well-documented history of ineffective, overworked, and too-often-absent defense counsel in traditional courts. See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14–17 (2009).

63. Meekins, *supra* note 5, at 91.

64. *Id.* at 92.

65. *Id.* at 106.

defenders' "enabling complicity."<sup>66</sup> A routine episode observed in Seattle Municipal Mental Health Court during the development of this Article<sup>67</sup> demonstrates the risk of undesirable consequences from increasing the distance (and decreasing the identification) between defense attorney and client. A somewhat agitated defendant approached one of the two defenders assigned to the court, both from the same firm, and asked the lawyer to explain his rights to him. Seemingly unsatisfied with her response, he said he wanted to hire his own lawyer, something that all appearances suggested he lacked the means to accomplish. It appeared that his dissatisfaction with the process (and thus his representation) was due to the fact that no significant action on his case would occur that day because a required evaluation had not yet taken place (through no fault of his). Stating that the court was "holding [him] hostage," he alluded to plans to take up residence in another state, something he could not do while the case was pending. He said he would be willing to pay a fine to dispose of the case, as he did not think the fine for trying to steal chocolate milk (his offense, at least as he understood it) could be that much. Before the client had started raising such concerns, the defender had greeted him cheerfully, affirming that the reports from the probation officer about his program performance were positive. The defender seemed put out by the client's persistence in the face of the court's general positive feelings about him. With several other clients to attend to during the brief period between the pre-court team meetings and the call of the calendar, the lawyer perfunctorily stated that evaluations for individuals who are out of custody tend to take longer and sometimes result in continuances. The defender never addressed the client's interest in leaving the state or resolving the case in any other way and more or less turned things over to a social worker, who engaged the client more empathetically and also more directly. When the court called the case, the client remained silent, his body language and affect those of a man beaten down, rather than

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66. NOLAN, *supra* note 23, at 81. Elsewhere, Nolan quotes a Department of Justice report stating that "[t]raditional defense counsel functions and court procedures often reinforce the offender's *denial* of [a substance abuse] problem." *Id.* at 49.

67. The events described took place on April 9, 2009. At all times described, I was seated in the public gallery of the courtroom, observing what any interested citizen might have seen.

built up, by the process that was supposedly helping him attain a new life.

Of course, delays and caseload pressures plague most courts, often leading to friction between defendants and their lawyers, the buffer or, in Casey's term, "barrier" between them and the system. The cautionary value of this account lies in its illustration of the manner in which problem-solving courts risk infantilizing participants, dispensing sympathetic encouragement rather than respectful engagement. To be clear, problem-solving court proponents have repeatedly emphasized that participation should be voluntary and fully informed.<sup>68</sup> However, they have not afforded much attention to the ways in which daily routines might warp or dull the edges of their innovative approach, deadening the process and subduing participants with good intentions.<sup>69</sup>

#### b. The Fundamentals of Defense: Voice

Defenders have strenuously objected to the manner in which problem-solving courts reconfigure courtroom communication, with defendants speaking more and defenders much less.<sup>70</sup> As described

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68. However, the proponents may have overstated the possibility of a genuinely free choice, given the background of a conventional court system in which harsh punishments are the norm. See DONALD J. FAROLE, JR. & AMANDA B. CISSNER, CTR. FOR COURT INNOVATION, SEEING EYE TO EYE?: PARTICIPANT AND STAFF PERSPECTIVES ON DRUG COURTS 5 (2005) ("[P]articipants in all drug courts agreed that the *primary* factor behind the decision to enter drug court was to avoid incarceration."). The following excerpt from a focus group lays this bare:

Moderator: Why did you enter the treatment court program?

Participant 1: To stay out of prison.

Participant 2: To avoid prison.

Participant 3: It's pretty simple.

Participant 4: Yeah, it's plain to me.

*Id.* The authors state, "Participants also felt that this decision is not completely voluntary. Drug court versus prison presents little real choice to most participants, with one commenting that 'it was this [drug court] or jail so we just picked this.'" *Id.*

69. See *supra* note 11.

70. See Meekins, *supra* note 5, at 123 (positing that "[r]equiring the defendant to discuss the matter in open court may . . . discourage the development of the attorney-client relationship"); Casey, *supra* note 5, at 1497 (suggesting that problem-solving courts' need for "unfiltered communication between defendants and the court" raises constitutional concerns).

above, the judge-participant colloquy is one of the defining features of problem-solving courts. In crucial respects, the formal content of the judge-participant exchange is almost irrelevant. The judge does not need to elicit details from the participant because someone from the multi-disciplinary court team (e.g., probation, social work, drug testing, or housing) likely already knows this information. Likewise, there is very little information the judge needs to deliver to the participant because frequent and regular contact with the team should ensure that the participant knows what is expected of him or her and what rewards or sanctions loom. Instead, the dialogue is part motivational speaking and part bonding-exercise. The judge demonstrates concern for the participant, support for his or her effort, and a commitment to continue monitoring, while also inculcating in the participant a sense of belonging and even obligation to the court community.

Engaging in this dialogue with the judge may present certain risks to the participants (e.g., having to address highly emotional information related to their struggles with addiction, mental illness, or other difficult issues), but not the ones defenders are trained and conditioned to protect against by limiting client speech. In conventional hearings, the defender serves as the primary spokesperson,<sup>71</sup> in part because, with the facts still undeveloped and the issue of guilt (or culpability) still unresolved, it is simply too dangerous to allow the client to speak freely. Judge Giselle Pollack, a supporter of problem-solving courts, described for the NACDL Task Force her difficulty allowing clients any freedom in this regard when she was a public defender:

I had a hard time stepping away from the podium . . . because I wanted the ability to, you know, touch my client's hand if he started to talk about things, you know, and if he started to talk about more, I would get more assertive in that regard and that's why I was so close, because I was very protective.

That's the environment I grew up in. I grew up in an environment where more often than not my client would say

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71. NACDL REPORT, *supra* note 6, at 39 (“Defense counsel advocacy in the open courtroom defines that role and is essential to the attorney-client relationship.”).

the most ridiculous things and they think they're helping themselves and would incriminate themselves all the time. . . .<sup>72</sup>

Virtually the only times that defendants do speak in court in conventional hearings are when they testify at trial or speak on their own behalf at sentencing. Both of those presentations should be the result of careful preparation with counsel. Defenders have been slow to appreciate the extent to which the problem-solving court regime has recalibrated the stakes. As a public defender in a conventional court, Judge Pollack was rightly worried about any slip a client might make that would help the state establish the client's guilt at a future proceeding. In problem-solving court review hearings, guilt with respect to the underlying offense is not the issue, and there will rarely be genuine factual disputes over program compliance. Defenders should certainly be ready to contest any allegations a client denies. However, if the issue is a positive drug test, the participant has little to gain from denial and some chance to benefit from forthright acknowledgment.<sup>73</sup> Meekins suggests that a participant ought not to be required to explain the circumstances surrounding program failure, such as illicit drug use, because the judge has the information needed to determine that a violation has occurred and impose sanctions.<sup>74</sup> This view is anchored in the dynamics of conventional courts, in which defendants, presumed innocent, benefit from inertia or stasis (i.e., "What the court does not know can't hurt you."). This approach ill suits the problem-solving milieu, in which guilt has been acknowledged, progress is the goal, and the court aims to create a dynamic learning process through which all actors, i.e., judge, lawyers, providers, and, most of all, the participants, develop a deeper understanding of the participants' needs and weaknesses. As uncomfortable as defenders are with the idea of standing by while their clients speak unprotected and unfiltered, there is evidence that

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72. Miami, Florida Hearings, NACDL Hearings, *supra* note 6, at 100.

73. *See id.* at 226 ("If they're dirty, we ask them 'Are you clean or dirty?' That means, 'Have you used? Will drugs be in your system?' If they tell us the truth, generally there may be a sanction, but a light sanction. If they lie to us, they will most probably end up in jail for two weeks for lying.")

74. *See* Meekins, *supra* note 5, at 123.

the participants themselves value this experience. Focus groups with drug court participants in New York showed that the interaction with the judge was extremely meaningful to them.<sup>75</sup>

Just as they have sometimes failed to see the benefits that participation brings to clients, many defenders have been slow to see how the risks have been reduced, and even eliminated, because of the changed practices and perspectives of their erstwhile adversaries, the prosecutors. The NACDL Report and much of the anti-problem-solving literature is haunted by the spectre of participants taking part in drug court because of an incidence of illicit drug use and then, in the course of a treatment review, admitting in open court a separate instance, rendering them vulnerable to prosecution for that as well. The NACDL Report appropriately calls for an explicit policy requiring prosecutors to forswear such practices.<sup>76</sup> Adopting such a rule, however, would merely institutionalize long-standing practice, adopted by judges and prosecutors who recognized its necessity, largely without input from defenders. As one judge has described it, “So the statements come up, it's never a situation where defense says, ‘Oh, my God, don't say that because the prosecutor is going to write that down and prosecute you.’ That doesn't happen.”<sup>77</sup> Steeling

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75. See FAROLE & CISSNER, *supra* note 68, at 15 (“A consistent theme is that the courtroom experience is critical to participants.”); *id.* at 16 (“Although appearing before the judge can be traumatic, participants also reported a sense of satisfaction when they received positive feedback.”).

76. See NACDL REPORT, *supra* note 6, at 26.

77. Miami, Florida Hearings, NACDL Hearings, *supra* note 6, at 266–67. Defenders themselves have reported the same. See *id.* at 98 (“I’ve never seen any statements that have been used . . . by any counselors or anything that’s happening in drug court been used in any prosecution.”). But some continue to trumpet the danger, as became evident later in the Miami hearing:

[QUESTIONER:] Is it the policy of the State Attorney’s Office to in any way in a new crime for which the person is prosecuted to go back to the drug court people, issue subpoenas, try to find out information that can be used to impeach the defendant if he takes the witness stand in a new case? Do you ever do that? Has it ever happened? Do you know of any situation?

MR. PAULUS: To my knowledge, it has never happened. . . .

But where they’re kicked out on—whatever violation, very rarely does the prosecutor in drug court have any real communication with the prosecutor in the other court other than, “We refer the case to you.” They don’t share information. We don’t talk about information. It doesn’t really work like that. It’s so treatment oriented.

themselves for battles they need not fight against enemies who have moved on,<sup>78</sup> defenders risk marginalizing themselves and shortchanging clients.

Addressing the subject of participant-judge dialogue, the NACDL Report asserts that “judges should not ‘discount’ the client’s answer because it seemed prepared. Prepared comments demonstrate that a participant was concerned enough to take time to prepare for a hearing.”<sup>79</sup> If “prepared” meant “the product of careful reflection on one’s behavior and its impact on one’s goals and the concerns of others,” this recommendation would be compelling. In fact, the Author has seen instances of this in Seattle’s Municipal Mental

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MR. CLARK: But it could?

JUDGE ROSINEK: Well, it’s a possibility the sun will not rise tomorrow.

MR. SCHECHTER: It’s not happening right now?

MR. PAULUS: To my knowledge, it’s never happened.

JUDGE ROSINEK: There is nothing that prevents it. It’s never happened. And if it happened, the credibility of the state attorney would be dissipated in my courtroom. I mean, we’d have to change the entire policy if it happened once. It’s never happened once.

*Id.* at 270–71.

78. Addressing the related but slightly different issue of whether prosecutors in California had disingenuously altered their charging practices to blunt the impact of the state’s treatment-first initiative, one defender explained to the NACDL Task Force that his efforts had failed to produce any evidence of this bogeyman, a cousin of the urban legend of the prosecutor who takes advantage of the freely communicating drug court participant:

Because I at one point sent out a department-wide e-mail and said, “Look, give me the case—any case in which the D.A. has filed something that keeps the person from becoming eligible for Prop 36.”

Well, they really couldn’t give me any. It was more one of these anecdotal sort of creations.

And if in fact the person really had a drug problem and just by the nature of the stop, the person had a nonqualifying crime, the D.A.s were actually dismissing stuff.

So we really weren’t seeing somebody that was, you know, harshly attempting to keep people out of drug treatment. I think initially that was the fear, people rumored about the fear, but in reality we weren’t finding that.

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And oftentimes, you know, we were finding in many instances that the D.A.s were in fact dismissing those cases or focusing on the drug treatment portion of it.

San Francisco, California Hearings, NACDL Hearings, *supra* note 6, at 18.

79. NACDL REPORT, *supra* note 6, at 37.



Health Court.<sup>80</sup> During one review hearing, a participant recited a letter she had written to the judge to explain some personal traumas she had experienced, which she believed had contributed to setbacks in her program performance. The letter, plainly written without input from counsel, drew a respectful and warm response from the judge. However, to the extent that participants' "prepared" remarks reflect painstaking consultation with risk-averse, ever-tactical counsel, a judicial discount seems the correct evaluation. The limited value of such statements can be seen from the formulaic responses one often sees in traditional courts when a defendant, in the course of entering a guilty plea, is asked to describe his conduct "in his own words." When lawyers are actively involved in "preparing" such clients, these statements betray a syntax and vocabulary straight out of the relevant code section and unmistakably alien to the client's personal perspective. Such preparation lubricates the routine of traditional courts and insulates the clients from any errant remarks, but their sterility renders them useless in a problem-solving court, an environment designed to stimulate growth.

*C. Resolution: Lower Volume, Greater Influence*

Deprived of the galvanizing contests that mark the days of a trial lawyer, defenders in problem-solving courts nevertheless perform distinctive and vital tasks. Their work begins with the defendant's decision to enter a problem-solving court program. This threshold moment has its obvious therapeutic implications, but a lawyer's priorities at this point ought to be fairly conventional, i.e., ensuring that defendants receive full information, candid advice, and time to make a considered decision.<sup>81</sup> Wexler suggests that defendants be

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80. April 27, 2009. Notes on file with author.

81. LAW IN A THERAPEUTIC KEY, *supra* note 24. Jeffrey Tauber, a judge and a leading promoter of problem-solving courts, agrees with this premise. *Impact*, *supra* note 48, at 1904 ("Certainly before someone enters a problem-solving court or at the time someone leaves a problem-solving court, there is a very important place for adversariness."). This recognition belies the characterization of the "difficult dilemma" facing a hypothetical lawyer who must counsel a client about entering a drug court while believing "that there is a high probability that the charges will be dismissed because of procedural irregularities in the arrest." Mary Berkheiser, *Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics*, 5 PSYCHOL. PUB. POL'Y & L. 1147, 1169 (1999). This is no dilemma. Counsel may discuss with

allowed, even encouraged, to watch problem-solving court proceedings and even visit service providers before making their decision. Wexler imagines that “[a] lawyer, or paralegal, might play an important role in maximizing the vicarious learning by sitting through the session and explaining to the . . . client exactly what is happening.”<sup>82</sup> These tasks are not as dramatic as cross-examining a witness or delivering a closing argument, but they can be quite challenging, especially for defenders in transition to the new role. The defender must be capable of representing the process to the client without unduly promoting the court or cynically tearing it down. Counsel should likewise assume a traditional posture when a client is facing termination from a problem-solving court. At that moment, the court has ceased working to solve the client’s underlying problem and is deciding merely the amount of sanctions to impose once and for all. At all points between entry and exit (successful or otherwise), the defender must continue the effort to maintain balance and clarity, as described by Jane Spinak, a clinician and defender with considerable experience with alternative courts:

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>83</sup>

Spinak’s call for sensitivity to “multiple messages” aligns with Dorf and Fagan’s description of the “web of reciprocal accountability”<sup>84</sup> in

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the client the option of obtaining treatment through the court, with the possibility of sanctions always lurking in the background, but must clearly and accurately present the option of seeking to suppress the evidence and obtaining treatment another way. For an example of a client opting for (and succeeding in) treatment despite a claim of innocence throughout, see Schreibersdorf, *supra* note 5, at 405–06. For evidence of the consensus on the importance of traditional defense representation at the time of potential discharge, see Casey, *supra* note 5, at 1515–16; NACDL REPORT, *supra* note 6, at 28; Tuscon, Arizona Hearings, NACDL Hearings, *supra* note 6, at 18.

82. Wexler, *supra* note 5, at 752.

83. Jane M. Spinak, *Why Defenders Feel Defensive: The Defender’s Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1621 (2003).

84. Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1508 (2003).

problem-solving courts. Both analyses emphasize the multiplicity of relationships that each actor in the process must establish and nurture. They also point to a new conception of advocacy for which the modern, networked generation of law students should be well suited. Defenders in traditional courts have asked little of other actors but the freedom to do their work. A map of their relations to others would show them on the periphery (the better to avoid being outflanked), but close to the client, with a single thick, dark line reflecting the intensity of the connection between them. The other actors in the system would be a good distance away. There is room in a web-like, diffusely networked community<sup>85</sup> for a distinctive relationship between lawyer and client, but both must move closer to and develop meaningful relationships with the other participants. Each member in the network must be capable of sending messages to and receiving messages from each of the others. This is quite different from the highly centralized network observed in conventional courts, in which all messages are ultimately directed to the judge and generally sent through and by counsel.

The problem-solving court community is intended to work constructively rather than competitively. Relationships between any two members (e.g., those between judge and participant or defense counsel and probation officer) need not interfere with or detract from other relationships (e.g., that between defense counsel and client). Instead, the multiple ties reinforce each other. The defense lawyer is better able to communicate with and advocate for the client because of her rapport with other community members, and the client is better able to take advantage of the lawyer's advice because of reduced dependence upon it. Unlike representation in a trial paradigm, where everything hinges on a single contest, representation in a problem-solving court is a continuous campaign, requiring coordination—and far more sharing of responsibility—between lawyer and client. Even more important than their increased in-court speaking role, clients embody their case directly through interactions outside of counsel's presence, let alone control. Nevertheless, counsel has a vital role to play in helping the client prepare for these interactions. Just as

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85. See Shomade, *supra* note 47.

lawyers traditionally prepare a client to testify, they can also role-play meetings with treatment court actors. These sessions are more difficult to simulate than virtually any cross-examination because they are not governed by a well-defined set of rules in the way that evidentiary hearings are. Defender offices, perhaps assisted by law clinics, might need to develop protocols with non-lawyer professionals from other disciplines in order to provide their clients with the greatest chance for success.

This preparatory role-playing is only superficially similar to preparing a client to testify or otherwise appear in court. Trial lawyers are taught that a first impression can be the difference between winning and losing.<sup>86</sup> In problem-solving courts, however, where participants will have repeated and extended exposure to the judge and other influential actors, a good first impression is merely a nice start. It will be of little long-term benefit if the client is not able to achieve and maintain the substantial and long-term behavior change that is the court's objective.<sup>87</sup> Defense counsel's ability to attain a distinctive "understanding of the individual client," to use Spinak's phrase,<sup>88</sup> can prove highly valuable in keeping the client on track and keeping other court actors invested in the client's success. This is a less triumphal vision than that of a Brougham-esque champion, but it is neither less important nor less difficult.

Two examples, one hypothetical and another based on an observation of mental health court proceedings, illustrate the complexity and centrality of counsel's distinctive advocacy role in problem-solving courts. In his discussion of the scope of due process protections in problem-solving courts, Eric Lane offers the example of a drug court judge faced with a request by defense counsel to allow a client to enter an outpatient treatment program following

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86. See, e.g., STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 309 (student ed. 2010) ("The attorney who is successful in seizing the opening moment will have an advantage throughout the trial . . .").

87. The motivational interviewing skills which Winick emphasizes are likely to prove essential to this long-term process. Winick, *supra* note 5, at 1080–81.

88. Spinak, *supra* note 83, at 1621. For discussions of the way an attorney can make sense of her understanding of the client, see David F. Chavkin, *Spinning Straw Into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 251 n.28 (2003); Kimberly A. Thomas, *Sentencing: Where Case Theory and the Client Meet*, 15 CLINICAL L. REV. 187 (2008).

three months of successful participation in inpatient treatment.<sup>89</sup> After consulting with the court's clinical director, outside of court but with notice to counsel, the judge denies the request. Lane's account of the hypothetical director's statement that "90% of those defendants who are able to successfully complete the first phase of the court's treatment component—remaining clean for four months—have either successfully graduated from the program or are still active in treatment after two years" will likely ring true to drug court veterans.<sup>90</sup> Even though this judge is relying on more data than would typically be available when making detention decisions in a conventional court, such information should be an opening, not an end, to the discussion. Counsel ought to have the opportunity to explore with the director and the judge the methods by which the data were collected and analyzed, the characteristics of the populations involved, and any salient features that might indicate a different course for a specific individual participant. Limited statistical expertise poses a far greater danger than the corruption which Meekins warns against.<sup>91</sup> Rigorous scrutiny of such extrapolation is essential because, unlike a judge's trial rulings in conventional courts, very little of what judges decide in problem-solving courts is subject to appellate review.

Moreover, such scrutiny is consistent with the "revisability in light of experience"<sup>92</sup> that problem-solving court practitioners ask of participants and should demand of themselves. Defenders can preserve their vocation's tradition of vigilance and challenge by holding problem-solving court decision makers to their promise of a learning environment in which the client's success is the primary objective. The capacity for data analysis and policy critique may be one of the most valuable resources law school clinics can bring to the problem-solving court arena.

As always, the value of defenders' activities must be measured in terms of its impact on clients. Meaningful review of court protocols

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89. Eric Lane, *Due Process and Problem-Solving Courts*, 30 *FORDHAM URB. L.J.* 955, 967–68 (2003).

90. *Id.* at 968.

91. See Meekins, *supra* note 5, at 123.

92. Dorf, *supra* note 22, at 940.

enables defenders to provide valuable advice to clients (e.g., “You know, we have really pushed them on this and it turns out that most folks do better with the transition if they have completed four months in this phase. I know you think you’re ready to move on now, and I can raise it with the judge, but I can’t think of anything that would qualify you as the kind of exceptional case that would make it a strong argument.”). On the other hand, advice tainted by the world-weariness common in conventional courts (e.g., “This judge wants his four months in. There’s just not much we can do about it.”) is likely to have an adverse impact on a client, alienating him or her from the process and reducing the chance of success. A similar conversation about a suppression hearing in a conventional court (e.g., “This judge tends to cut officers a lot of slack.”) may likewise reduce a client’s respect for the judiciary, but it will not impede the client’s chances because the client’s ongoing behavior is not at issue in such proceedings. Both the client and the defender are likely to reap the benefits that accrue from the judge’s recognition that they are both sufficiently invested in the rules of the program that they avoid conflict when it is not truly indicated.

Embracing their educative function, attorneys can play a vital role in developing clients’ effectiveness as advocates in court as well. In his call for defenders to adopt a more therapeutic orientation to their practice in all settings, Wexler suggests that lawyers might “create a ‘bank’ of videotapes of victim statements, and ultimately suggest that a client, in preparing a written apology letter (or videotape), include a section where he or she imagines the many ways in which the crime likely affected the victim’s life.”<sup>93</sup> Given the nature of the offenses in question, victim impact, in its narrowest sense, generally plays a lesser role in drug and mental-health courts than it does in other courts. Possessory drug offenses are victimless crimes, and many of the cases on the dockets of mental health courts do not involve grave harm to victims.<sup>94</sup> However, drug addiction and its attendant behavior often results in great harm to others, especially family members.

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93. Wexler, *supra* note 5, at 755.

94. The chocolate milk theft example cited earlier is not atypical in mental health court, something that has, understandably, produced concern about the net-widening effect of such courts. See NACDL REPORT, *supra* note 6, at 42.

Loved ones likewise often bear considerable burdens because of the acts of the untreated mentally ill. By helping clients articulate their awareness of this aspect of their experience, defenders can positively influence the clients' performance during their colloquies with the judge. Because these subjects are so highly charged with emotion and the clients are so vulnerable, Quinn's concern about the dangers involved must not be forgotten. However, the fact that an attorney might not possess the competence to perform this function alone does not mean she cannot facilitate the process, drawing on the support the network promises the client.

A case observed in mental health court provided a quite different example of how defender membership and participation in a networked court community can produce results similar to those obtained through conventional advocacy. A defendant came to court having previously been placed on Electronic Home Monitoring (EHM) because of violations earlier in the case. The defendant had done quite well on EHM, complying with its requirements and advancing toward his treatment goals. At the hearing, the probation officer reported on this performance and also informed the court that the defendant wished to be released from EHM. The probation officer reluctantly supported this request, reenacting aloud his internal deliberations. He made the cases for and against the move (a reward for positive performance versus the risk that removing the structure that had promoted change would invite a return of earlier difficulties). This soliloquy accurately represented the arguments that defense counsel and the prosecutor would likely have made in a traditional court. The probation officer's ability to encapsulate the traditionally competing perspectives reflected the success of the court team in forming a cohesive unit that respects and appreciates the legitimacy of often-clashing interests implicated in the criminal justice system. Asked if he had informally lobbied the probation officer before the hearing, defense counsel said he had not. In context, this was not an abandonment of his duty as an advocate but rather a proper judgment about the operation of the network in which he operates daily. Confident of his connection to the probation

officer,<sup>95</sup> he could watch silently as the process unfolded, with the result that his client benefited because the recommendation came from the court's own staff rather than the client's partisan representative.<sup>96</sup> Experienced lawyers make similar judgments in the context of litigation all the time, placing their clients' fate in the hands of someone they trust will do what they and the client wish.<sup>97</sup>

Neither the principal performers nor even the orchestrators of the performances of others, defenders in problem-solving courts are a connective force, bolstering clients' ability to advocate for themselves and ensuring that clients' efforts are properly supported and appreciated by others. Ironically, the one stage in the process where defenders are most likely to perform traditional advocacy is the team meeting, the most distinctive, and often most important, part

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95. *Impact*, *supra* note 48, at 1904 (“[P]erhaps one of our strongest, if not our strongest, suits . . . is the capacity of the people who work around the problem-solving court to become a team, to really see the issue together—not necessarily see the solution together, but see the issue together and see the need for a solution, and then to work together from their various perspectives to make that solution a reality.”); *see also* Tucson, Arizona Hearing, NACDL Hearings, *supra* note 6, at 195–96. Tammy Wray stated:

I know, I've been working with these probation officers for years, and I respect them, and I count them as my friends.

In fact, I work with more probation officers than I do attorneys. And so in that respect, the good part of that, is that when, that I have a better rapport with them, and they know me, and I can go to them and say listen, we're having this issue with this client, what can we do? How can we handle it?

They're more likely to listen to me than they would be to listen to an attorney that they didn't know, or than a standard probation officer would.

*Id.*

96. Certainly, counsel retained the ability to address the court if probation had not done so, but even more than in traditional courts, the likelihood of success in overriding a probation officer's recommendation is exceedingly slim in problem-solving courts. NOLAN, *supra* note 23, at 151 (referring to judicial deference to treatment staff).

97. *See* San Francisco, California Hearings, NACDL Hearings, *supra* note 6, at 1.

I mean, and those of us that have worked in front of really good judges, you know what that means. I mean, you can do an open plea with a judge, and everybody says, “Are you crazy?” And you say, “No, I am not crazy because I know this judge will do the right thing.”

And so it's that dynamic that works in the criminal justice system works best in adult drug court.

*Id.*



of the problem-solving court process.<sup>98</sup> Without the client at her side, the attorney must integrate the new information provided by other team members into her ongoing “understanding of the individual client” and then devise a response that advances the client’s interests. In court, counsel can relate any additional pertinent information obtained from the client after the staffing, but the general commitment to the team process cloaks the recommendation with an authority and momentum that can be hard to unravel. Accordingly, counsel’s “understanding of the individual client” must be sufficiently strong as to make the client a real presence at the lawyer’s side, enabling the lawyer to assess the various reports through the client’s eyes. Counsel will need to engage in the sort of creative, yet grounded, narrative thinking that marks the finest trial lawyers, even though they will likely remain seated at the table and speak in a very different register from that which would characterize a trial opening or closing.

Convincingly summoning the client’s fictional presence into the staffing ensures integrity as well as creativity. Addressing attorneys representing children in child-welfare proceedings, Jean Koh Peters has advised, “[N]ever act or make statements outside the presence of your client that you would not make in front of your client.”<sup>99</sup> Peters writes that it is necessary to make this command explicit because “children often do not attend critical events at which legal issues are decided on their behalf.”<sup>100</sup> Problem-solving court staffings are critical, and participants are entitled to have counsel present,

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98. *See id.* at 173. Jeffrey Thoma stated:

[A]nd what you are able to do at the staffing is bring everything to bear. If that person gets a dirty test yet you want to bring in, okay, but, look, they just got their GED, and they were celebrating or whatever. Look what they have done. Look at the last six months, and look at the job they have done and everything, and you try to bring whatever positive you can, and that’s what the staffing is all about.

*Id.*

99. JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 132 (3d ed. 2007). Peters’ work anticipates some of the other critical challenges in problem-solving court lawyering. Her command to “Cultivate Right Relationships with Other People in the Child’s World” aligns directly with the discussion, *supra*, regarding how attorneys can be effective within the network of relationships in a problem-solving court community. *Id.* at 134.

100. *Id.* at 132.

engaged, and singularly committed to their success. In important respects, Peters' dictum might be edited to say that counsel should "never act (*or fail to act*) differently because the client is absent." Because there is no record of these meetings nor any outside observation, the risks of co-optation that problem-solving court opponents have raised are likely greatest at this juncture.

This Part has attempted to illustrate the ways in which representing clients in problem-solving courts presents defenders with challenges that are as urgent, rich, and potentially fulfilling as those that defenders have long embraced in the traditional trial court setting. The forms that representation takes are often, but not always, different, but the core commitment to the client's chosen path toward success remains the same. Those who have succeeded in making this adjustment have recognized the scale of the challenge and the level of professional expertise required. Judge Kluger remarked, "I think some of the institutional public defenders make a serious mistake when they assign their least-experienced, and sometimes their least-able, lawyers to these courts."<sup>101</sup>

Howard Finkelstein, a Florida public defender, made similar statements:

[M]ost offices usually have their less skilled lawyers handling drugs and mental health stuff. We have some of our best lawyers, most experienced lawyers in here for that exact reason, because I know there is this slippery slope and I need lawyers in there who at least, hopefully, will know when it's time to walk across the line and sing Cumbaya and when it's time to stay on this side of the line and throw the gauntlet down.<sup>102</sup>

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. . . I don't have my baby lawyers in there. [The defender assigned to this mental-health court], 30 years he's been a public defender doing nothing else but mental health.

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101. *Impact*, *supra* note 48, at 1894.

102. Miami, Florida Hearing, NACDL Hearings, *supra* note 6, at 184.

So I've taken one of my best, most experienced, highest paid people and I've put him in there . . . .<sup>103</sup>

Part II of this Article will address the challenges of introducing clinic students, “baby lawyers,” into this world in which the expectations for lawyers are still being clarified and the judgment demanded of them is highly refined.

## II. CLINICAL THEORY IN PROBLEM-SOLVING PRACTICE

Clinical educators have the opportunity to play a leading role in shaping the way that problem-solving justice enters and influences law school curricula.<sup>104</sup> The clinical method and the problem-solving model share a common spirit of pragmatic inquiry. Addressing “how we can use innovative practices in the fields to play back on legal education,”<sup>105</sup> commentator Derek Denckla suggests that “the problem-solving court’s model tries to author a different notion of lawyering where the notion of the case should be expanded.”<sup>106</sup> Many clinicians would affirm Denckla’s commitment to innovation, as well as the imperative of drawing pedagogical inspiration from practice and the need to redefine how lawyers wield their professional skill and authority. Equally important, problem-solving justice and clinical education also share a commitment to “revisability in light of experience.”<sup>107</sup> Problem-solving courts are designed to “use data to make more informed decisions about where to target resources and how to craft effective sanctions.”<sup>108</sup> Donald Schön, an influential

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103. *Id.* at 188.

104. To date, the literature reflects some carefully considered but highly limited experiments with problem-solving or therapeutic practice. See Gregory Baker & Jennifer Zawid, *The Birth of a Therapeutic Courts Externship Program: Hard Labor But Worth the Effort*, 17 ST. THOMAS L. REV. 711, 722 (2005); Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429 (2005). Each of the courses described in these articles offers students an opportunity for structured experiential learning within a problem-solving or therapeutic milieu, but neither places students in a position of responsibility for clients, an essential component of clinical education, as described within.

105. Symposium, *Alternative Approaches to Problem Solving*, 29 FORDHAM URB. L.J. 1981, 1995 (2002).

106. *Id.* at 1997.

107. Dorf, *supra* note 22, at 940.

108. See BERMAN ET AL., *supra* note 23, at 33.

scholar on the subject of professional expertise and learning, warned that clinical legal education was unlikely to be successful if its precepts were not measured against experience for their accuracy.<sup>109</sup> This Part of the Article will explore both the affinity and the tension between problem-solving practice and clinical education,<sup>110</sup> ultimately sketching an understanding of how the two approaches can be aligned to the maximum benefit of students, the clients they serve, and the legal system in which they practice.

#### *A. Learning (Through) Responsibility and Relationships*

Responsibility toward a client is what most clearly distinguishes a law student's clinical experience from the rest of law school.<sup>111</sup> This responsibility can engender a disorienting lack of control.<sup>112</sup> The

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109. Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 243 (1995).

110. The field of modern clinical education is vast, encompassing the representation of individual clients in high-volume courts and administrative agencies as well as legislative advocacy, international human rights reporting, and even appearances in the United States Supreme Court. This section of the Article will focus on several common features of clinical teaching that transcend many of the distinctions within the field.

111. See Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1053 (1985) ("Our primary objective is an ambitious one: to help law students learn to accept responsibility. . . . [Supervisors' commitment to student responsibility includes] permitting them to make case decisions entirely at odds with those that we would make if we were counsel for the client."); Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 270 (1998) ("Students continually assume direct responsibility for weighing choices and planning courses of action in problematic circumstances."); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1663 (1991) ("[A]ctively taking responsibility contributes to the development of responsible character to a greater extent than any other approach.").

112. For an illustration of the importance of a sense of control to clinic students, see Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLINICAL L. REV. 299, 302 (1994) ("I had a terrible time. I found the work more than difficult; I found it excruciating. I was anxious all the time. I felt insecure. I felt out of control. I could not relax. In short, I was not having fun."); *id.* at 307 (listing "Lack of Control" as the first of three "themes" influencing the author's negative reaction to his clinic experience); Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 CLINICAL L. REV. 167, 182 (1995) ("This lack of control is multiplied for a student-lawyer. Completion of tasks becomes the only way we feel a sense of control, and thereby relieve some of the anxiety that we develop."). The title of Fran Quigley's article, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995), aptly captures this aspect of the clinical experience.

grave needs of clients with serious mental illness, such as those in problem-solving mental health courts, might understandably be seen as exacerbating the feeling of absence of control.<sup>113</sup> In my observations of mental health court, I have witnessed defendants decompensating in ways that made me uncomfortable even though I was a mere observer and I have nearly two decades of professional experience, including the representation of many clients with mental illnesses. Students, feeling the weight of their inexperience, will almost certainly wrestle with even greater anxiety at such moments. However, the design and ethos of mental health courts reduce the burdens on defense counsel (and thus clinic students) in such situations. When clients experience a crisis related to their condition, they are not violating a behavioral norm—as it would seem in a conventional court—but instead are exhibiting the need for support and services that brought them to this court in the first place.<sup>114</sup> Because such an episode does not jeopardize the client’s long-term prospects, clinic students, as defenders, should feel no need to improvise a miraculous solution.<sup>115</sup>

Clinical teachers can guide students toward effectiveness in problem-solving courts through the creative adaptation of several core concepts within the clinical lawyering literature. Chief among these theoretical resources is the focus on the lawyer-client relationship as the central subject within the clinic experience.<sup>116</sup>

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113. See Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 978–79 (1991–92). Dinerstein describes the experience of a clinic representing a defendant with mental illness in a conventional criminal proceeding:

Then all hell broke loose. . . . Mrs. Smith suddenly interrupted the colloquy and began to complain that the complainants . . . were continuing to bother her and that the conviction was unfair. She grew increasingly agitated, yelling “Excuse me, excuse me,” whenever the judge tried to get a word in. Though we tried, there was little we could do to control her.

*Id.* Dinerstein’s account stands as an early—and more powerful because incidental—indictment of conventional courts as tribunals incapable of addressing the needs of people with mental illness.

114. See *supra* note 27 and accompanying text.

115. See Dinerstein, *supra* note 113, at 979 (describing how a student’s attempt to persuade the judge not to detain a client in midst of mental health crisis backfired, with the result that the judge not only detained the client but also ordered a child protective services investigation).

116. Robert Dinerstein et al., *Legal Interviewing and Counseling: An Introduction*, 10 CLINICAL L. REV. 281, 289 (2003) (“Most of the time that lawyers spend and the intellectual

Client-centeredness, perhaps the core tenet of modern clinical education,<sup>117</sup> has a distinctive potential meaning and impact in problem-solving practice. In ways that are unusual, if not quite unique, the proceedings are about the client. The court's primary focus is the client's current progress. By and large, neither the historical facts of the criminal incident nor any complex legal analysis will be critical to the outcome of the proceedings. Instead, lawyers must develop an "understanding of the individual client." To achieve this, a lawyer must encourage the client to share her vision for life beyond the court, what Kate Kruse has referred to as the "project of 'becoming' the kind of person the client wants to be."<sup>118</sup> Valuable in any representation, the extra effort to understand the "kind of person the client wants to be" is especially important in problem-solving courts because the conditions that bring clients into such courts (e.g., addiction, mental illness) will often divert them from (and lead them to lose sight of) their goals.<sup>119</sup> In addition, as

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energy that they bring to their work is not devoted to events in a tribunal, whether it be a trial or appellate court, an administrative agency or before some other decision-making authority. Much of lawyers' work and talents are devoted to the development of a relationship with their client."); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 190 (2002) (referring to "the last foundational element of modern lawyering theory: the centrality of the lawyer-client relationship").

117. See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004). Cataloging the citations in the clinical literature to this work in its two editions would be an immense undertaking. The following short list of citations to works with the phrase "client-centered" in the title shows the early and continuing influence of the authors' approach to thinking about lawyering: V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002); Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379 (2006); John B. Mitchell, *Narrative and Client-Centered Representation: What is a True Believer to do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85 (1999); Laurie Shanks, *Whose Story Is It, Anyway?—Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLINICAL L. REV. 509 (2008); Linda F. Smith, *Interviewing Clients: A Linguistic Comparison of the "Traditional" Interview and the "Client-Centered" Interview*, 1 CLINICAL L. REV. 541 (1995).

118. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 411 n.190 (2006); see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

119. In the context of outpatient commitments of individuals with mental illness, Winick

noted in Part I, some preliminary research has shown that participants enter problem-solving court more from the desire to avoid incarceration than from a settled pursuit of any particular goal.<sup>120</sup> A lawyer's effort to understand the client's aspirations can make the difference between failure and success for the lawyer and the client.

Problem-solving court practice also provides an excellent setting for examining the extent to which lawyers' relationships with their clients are aligned with the other important relationships in the clients' lives. As a team of experienced clinicians have observed, "[c]lients . . . have families and communities to which they are connected. . . . These connections . . . will in turn affect the kind of connections that lawyers make with their clients."<sup>121</sup> Many clients in mental health court have become separated or even isolated from their support systems, often because of their untreated illness and its effects on their behavior.<sup>122</sup> Families that remain actively involved with and supportive of their struggling relatives confront their limited ability to achieve a significant impact in helping the participants to overcome the burdens of their conditions. The court and its team fill this gap in the client's life, providing meaningful connections that must become an essential unit of lawyer's study and strategy.

As described in Part I, the team meeting is the pivotal event in problem-solving courts. Clinical teachers in such courts can (and must) use their supervisory role to help students see possibilities for meaningful action that might not be apparent at first glance to novice professionals equally excited and overwhelmed<sup>123</sup> by the prospect of

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proposes the idea of advance directives, acknowledging that they present "a number of legal, ethical, clinical, and logistical challenges." Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL'Y & L. 107, 129 (2003). During their periods of stability and insight, often achieved through the engagement of effective treatment, such individuals would be permitted to establish the ground rules for how they wish to be treated in the event that they end up lacking in insight, whether due to their failure to comply or merely the overwhelming nature of their condition. *Id.*

120. See *supra* note 68.

121. Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 756-57 (2004).

122. My observation of mental health court proceedings produced this impression, which I confirmed in conversation with one of the experienced defense attorneys assigned to the court. Needless to say, this speculation is ripe for more systematic verification.

123. See Goldfarb, *supra* note 111, at 1652 (describing students' experience of "a jumble of impressions, sensations, feelings, intuitions, and actions").

representing clients. In many clinic settings, students can develop the bond with the client through a series of meetings designed to develop the facts underlying the case. Although students often have many collateral sources for exploring such facts, the process of seeking the client's input validates the client's importance to the case and establishes the foundation of the relationship. This process furthers the students' professional development as well because it forces them to practice the habits of refraining from premature conclusions and simultaneously holding generous and critical interpretations of ambiguous client disclosures.<sup>124</sup> This model of relationship-building is not wholly compatible with the problem-solving court routine. With a schedule full of meetings with court-related personnel, a client will perceive little added benefit from reporting to her student-lawyer what she has likely already reported to the other court team members she sees during the week. Moreover, the inquiry will not only rankle as redundant, it may create the impression that the student-lawyer is peripheral to the court's process ("If you were really plugged in, you would know all this."). Although not interacting with the other team members as often as the client, the student-lawyer does have a seat at the team meeting, something the client does not. Students can use that as the basis for a distinctive and productive conversation with the client, inviting the client to share her thoughts about her relations with the other team members and her feelings about the court process as a whole. Such an inquiry validates the client as a key contributor to the representation and enables the student to pivot into a demonstration of her capacity to ensure that the meeting is governed by a genuine respect for the client's experience.<sup>125</sup>

The student must use her independent appreciation of the team dynamics to affirm and, where necessary, challenge the client's assessment. Demonstrating her own assessment of how different team members will act in the meeting,<sup>126</sup> the student can prepare the

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124. See Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001).

125. The failure to communicate to clients the manner in which the lawyer will be working for the client at the meeting may explain, at least to some degree, why participants often remain ignorant of their lawyer's advocacy role. See FAROLE & CISSNER, *supra* note 68, at 10–11.

126. Aaronson, *supra* note 111, at 278 (noting the importance of lawyers' ability to "project themselves imaginatively into the place of others").



client for the likely result of the meeting while also demonstrating how she stands apart, if only slightly, from the rest of the team. The students' ability to credibly portray the team members, whom the client knows well, tests a student's empathy (for client and team member) and his or her performance skills. Effective performances of this type, every bit as difficult as litigation,<sup>127</sup> could make some difficult conversations bearable for the client, thus putting in motion a virtuous cycle in which understanding replaces resistance and sets the stage for success.

The effort described here to fathom and refine the client's appreciation of his or her place within the court community embodies the commitment of clinical teachers to help students develop the ability "to think flexibly and creatively about how to approach the variety of interactions that can occur within the lawyer-client relationship, rather than unreflectively reverting to a standardized vision of the relationship that makes other interactions seem deviant."<sup>128</sup> This is a valuable contribution that clinics can make to courts that are peculiarly vulnerable to the risks of standardization present in any high-volume justice system.<sup>129</sup> Problem-solving courts' distinctive remedy is intended for a specific set of problems. The process of classifying defendants as eligible for treatment results in a label that may suppress the idiosyncratic aspects of any individual participant's experience. Lawyers in problem-solving courts must be committed to preserving the client's individuality, preventing the process from lapsing into the kind of impersonal, standardized ritual that problem-solving courts were designed to replace (in other words, McTreatment substituting for McJustice). The NACDL Report

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127. For a provocative illustration of how client counseling can entail a litigation-like performance, see Abbe Smith, "I Ain't Takin' No Plea": *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11, 17 (2007) (recounting an attempt to persuade a client to accept what she believed to be an extremely favorable plea offer: "I did my best to engage Benny. I asked questions. I urged him to ask me questions. I shared the police and investigative reports with him. I used 'silence,' sitting quietly with Benny while everything sunk in.").

128. Dinerstein et al., *supra* note 116, at 291; *see also* Scherr, *supra* note 116, at 270 ("The lawyer-client relationship entails a negotiation of extraordinary fluidity and depth.").

129. NOLAN, *supra* note 23, at 124 (relating the story of one participant who encountered resistance from his probation officer because he preferred to talk about his substance abuse in a religion-tinged idiom of demonic possession rather than the preferred medical image of disease).

highlighted the fact that private counsel have largely been excluded from problem-solving courts.<sup>130</sup> The absence of an outsider's perspective increases the danger that defenders who are a regular presence in the court will be co-opted through their daily collaboration with the members of the court team. Clinic students and faculty, by virtue of their insider-outsider status (i.e., the ability to participate as part of the team, but to maintain distance and perspective because they are not present everyday), can make a special contribution to the workings of the court, holding the process to the measure of its commitments and making powerful the client's imagined presence.<sup>131</sup>

### *B. Narrative Modes of Problem-Solving Lawyering*

Narrative theory, a powerful element of much clinical teaching,<sup>132</sup> proceeds from the recognition that problems, or "trouble," are an essential component of any story.<sup>133</sup> Without trouble, there is no motivation to generate the change that gives the narrative its drive. Often, this problem or trouble becomes apparent through conflict. Problem-solving courts are designed to foster change by minimizing conflict and eliminating the initial problem. Such courts present distinctive challenges for clinicians committed to teaching students how to wield the power of narrative. Students will not be effective in team meetings if they advocate as if they were delivering a closing argument before a jury.<sup>134</sup> Instead of novel or arresting images with

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130. NACDL REPORT, *supra* note 6, at 34 ("The drug court model favors institutional players; some even forbid appearances by private counsel. Moreover, the required frequent appearances, sometimes with little or no notice, further discourage private counsel from representing clients.").

131. See PETERS, *supra* note 99; see also *supra* note 99 and accompanying text.

132. See Alper et al., *supra* note 37, at 1–32; Philip N. Meyer, *Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in The Estate of Karen Silkwood v. Kerr-Mcgee, Inc.*, 9 CLINICAL L. REV. 229 (2002).

133. See Alper et al., *supra* note 37, at 22–30.

134. See Aaronson, *supra* note 111, at 251 n.8. Aaronson relates one illustration of lack of judgment by a lawyer who failed to calibrate his performance to the setting. Meeting with welfare officials to discuss the implementation of new regulations, the lawyer "insisted on arguing points of law as though he were in a courtroom. He was totally unmindful of the purpose of the meeting and what might be helpful and persuasive in the particular situation." *Id.*; see also Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 35 (2001) (faulting traditional law school

bold, dramatic story arcs, students will tell stories of incremental progress or setbacks and will persuade primarily through ethos, acknowledging the team's contribution to the client's success. Listening skills will be at least as important as speaking.<sup>135</sup> It is only through wise listening that the students will learn the idioms and register of the group's discourse and will sense the moments when speaking will have the desired impact. This does not mean they need to agree with other team members all the time. Principled disagreement ought to be welcomed. It does mean, however, that they must demonstrate genuine respect for the views of others, and, at the start of the process, some appreciation for the experience and expertise the team members have with these sorts of cases. This is not unlike the sort of genuine-but-not-disabling deference with which lawyers should face a judge presiding over a bench trial.<sup>136</sup> The advocate's goal is not to get the upper hand on an opponent but instead to work in step with a fellow venturer. An effective advocate in such settings must be able to perceive and respond to feedback on an ongoing basis.

### *C. Collaboration, Inter-Disciplinarity, and the Reach of the Problem-Solving Model*

Collaboration is often an essential feature of clinic practice and pedagogy. Students collaborate with student-partners assigned to work with them on cases.<sup>137</sup> They collaborate, formally and

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curriculum for failing to teach students to “determine what the limitations of a given forum might be and determine how best to work within that forum”).

135. Baker & Zawid, *supra* note 104, at 738–39. The authors give the following example:

[W]hile so much emphasis in traditional skills training is placed on speaking, the emphasis in Therapeutic Jurisprudence is on listening. By placing a focus on listening, students are better able to understand the opinions and concerns of other team members and client. Since so much emphasis is placed on team meetings, advocacy skills are honed in this setting. Albeit different from courtroom arguments, students learn to espouse their views and recommendations in a manner that focuses on consensus building.

*Id.*

136. For a discussion of managing dialogue and feedback in bench trials, see Paul Holland, *Sharing Stories: Narrative Lawyering in Bench Trials*, 16 CLINICAL L. REV. 195 (2009).

137. See David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLINICAL L. REV. 199 (1994).

informally, with the other teams of students working on similar cases, and, of course, they collaborate with the faculty supervisor supporting and guiding their representation and learning. In addition, many clinics include non-lawyer participants (e.g., social workers, doctors, mental health professionals) who bring special knowledge to the clinic's work. Problem-solving practice adds an additional collaborative dimension to clinical education in that the students must learn to perform successfully within the court's inter-disciplinary team concept. Problem-solving practice de-centers the lawyer, enabling faculty to teach a more robust version of interdisciplinarity. The other professionals are not working merely to carry out the lawyer's strategic objectives. Instead, the notion of control by any one individual or agency is questionable in this setting. This aspect of problem-solving clinics is likely to appeal to the "Millennial" generation, whose members are frequently depicted as "team-oriented" and inclined to "like and understand the importance of teamwork."<sup>138</sup>

This team orientation presents challenges and opportunities for clinical faculty as well. The first challenge is one of letting go, or relaxing the bonds between student and teacher. Just as lawyers representing clients in problem-solving court must come to trust the other actors and to allow them greater access to and responsibility for the client, so must clinicians teaching in this setting allow and encourage the other team members to play a significant role in the students' development. Clinicians must retain the same insider-outsider perspective on the student's progress as a lawyer must with respect to a client. They must model professional respect and facilitate appropriate critique.

One of the simplest yet potentially most rewarding ways to teach this particular form of collaboration will be through the standard clinical practice of well-constructed simulations. The multiplicity of actors in team meetings provides a wide array of roles for students to inhabit, thus enabling many students to be involved. Faculty could invite some or all of the actual treatment team members to observe or participate in such simulations (live or via video recording) and to

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138. Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 261 (2009).

critique the students' performance. Such an invitation would be useful on many levels. Invitations to teach are an implicit communication of respect and would likely ingratiate the teacher and students to the other professionals. Students and faculty would obtain high-quality information as to how the non-lawyer professionals think in role and how they perceive the communications of other team members. In turn, having encouraged the professionals to articulate the rationale for what they do (or what they think they are doing), the law students and faculty could engage these non-lawyer colleagues in dialogue that might influence their work in the future.

The thoroughgoing attention to collaboration in the classroom and at the courthouse will equip students for a wide range of post-graduate experiences. The emerging field of collaborative family law<sup>139</sup> is perhaps the most obvious. In a "collaborative" divorce process, each party, although represented by counsel, agrees to forgo adversarial litigation and to facilitate the disclosure of pertinent information. The similarities with problem-solving court practice, already obvious, can be extended to include the participation of non-lawyer experts whose knowledge will help the family solve problems in a broad range of areas: finance, child development, and psychological and emotional health.<sup>140</sup> Collaborative law offers a particularly powerful parallel for problem-solving court practice because it is both voluntary and, often, expensive.<sup>141</sup> The fact that individuals with considerable financial resources are prepared to forfeit their rights to have a gladiator-lawyer pursuing their goals is a

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139. See SHEILA M. GUTTERMAN ET AL., *COLLABORATIVE LAW: A NEW MODEL FOR DISPUTE RESOLUTION* 245–66 (2004).

140. See *id.* at 13 ("Collaborative law moves the focus of the matter away from the threat or expectation of a courtroom battle and puts the parties, their lawyers, and other specialists to work as a single problem-solving unit."). Like the problem-solving court movement, the collaborative law movement also has an accepted creation-story, rooted in an epiphany experienced by Stuart Webb, a long-time Minnesota practitioner who had exhausted his tolerance for the needless pain and misery which resulted from the traditional scorched-earth approach to divorce litigation. See Pauline H. Tesler, *Collaborative Law: Practicing Without Armor, Practicing With Heart*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION*, *supra* note 5, at 259, 267.

141. The University of Virginia Family Dispute Resolution Clinic offers a rare example of an attempt to extend the benefits of the collaborative approach to parties of limited means. See *Family Alternative Dispute Resolution Clinic*, UNIV. OF VA. SCH. OF LAW, [http://www.law.virginia.edu/html/academics/practical/family\\_adr.htm](http://www.law.virginia.edu/html/academics/practical/family_adr.htm) (last visited Oct. 7, 2010).

powerful testament to the perceived benefits of non-adversarial legal problem-solving and at least a partial answer to concerns that criminal law problem-solving courts are designed to take advantage of clients with limited resources. The parallel is not perfect, of course. The state is not a party to a divorce. More significantly, collaborative divorce practice does not countenance making important decisions in the absence of the parties. Rather, participation by the parties is deemed essential to the process of devising a long-term solution.<sup>142</sup> Even this distinction is not total, however. Leading collaborative practitioners recognize that the experience of divorce (and the process toward it) can have a highly destabilizing impact on clients, rendering them temporarily incapable of keeping sight of, let alone achieving, their long-term goals, much as clients suffering from addiction or mental illness often experience.<sup>143</sup>

The developing influence of these two models, each in a field long characterized as high in conflict, is likely to fuel change in other practice areas as well, and problem-solving clinic graduates will be well suited for these new opportunities. William Simon has written that the skills required of defense counsel in problem-solving courts are similar to those already employed by transactional lawyers<sup>144</sup> or

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142. SHERRIE R. ABNEY, *AVOIDING LITIGATION: A GUIDE TO CIVIL COLLABORATIVE LAW* 11 (2005) (“Nothing is decided unless the parties are present.”); GUTTERMAN ET AL., *supra* note 139, at 81 (“The essential work in a collaborative law case happens transparently—in the open, in front of and in conjunctions with clients—usually in meetings where clients, counsel, and any other pertinent team members are present.”).

143. See GUTTERMAN ET AL., *supra* note 139, at 22. Gutterman and her co-authors quote Pauline Tesler, experienced family lawyer and collaborative law pioneer, describing what she might say to a client who, in such a raw emotional state, might request that counsel engage in traditional practices, such as withholding information or unnecessary litigation: “You are currently not the person who I contracted to conduct this collaborative law process with. That person is your higher self, and it is from her that I take direction.” *Id.* For an account of a quite similar lawyering perspective from a legendary lawyer in the traditional heroic mode, see EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS: ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER* 177–80 (1991).

144. Simon, *supra* note 54, at 1605. Simon observes:

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.

those representing business clients in highly regulated industries.<sup>145</sup> The ability to achieve one's objectives in a group decision-making process also has obvious relevance for public policy-making arenas (everything from a city council to a legislative committee) as well as the internal decision-making processes of law firms (both public and private). There is little opportunity within the law school curriculum for students to apply sustained effort to thinking about and working through the challenges of successful group processes.

Students' ability to apply the lessons of problem-solving clinics in these disparate post-graduate practice settings will provide a measure of the extent to which the clinic faculty who taught them have achieved what learning theorists refer to as "far transfer," i.e., students' ability to adapt the lessons from a learning experience to a context that is markedly dissimilar.<sup>146</sup> Problem-solving courts exhibit elements that David Binder, Albert Moore, and Paul Bergman cite in their description of a learning environment conducive to transfer: (1) student practice is situated within a conceptual framework; (2) students have multiple opportunities for practice; (3) the practice is spread out over time; and (4) students experience a gradual increase in task complexity.<sup>147</sup> Although improvised into existence, problem-solving courts have developed within a clearly-designed conceptual framework. Moreover, because these courts remain an alternative to the standard model of criminal justice, teachers must explicitly elaborate that new framework. A problem-solving court clinic can reliably provide students multiple opportunities for practice that are spread out over time and feature an increase in complexity.

In a traditional criminal trial clinic, faculty will be hesitant to assign students too many cases, lest they all wind up going to trial, leaving the students overwhelmed and/or leaving the faculty

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145. *Id.* at 1600. As with collaborative law, the fact that this model of lawyering is employed to serve powerful actors suggests that it cannot be automatically dismissed as non-viable with respect to indigent criminal defendants. However, Simon's business lawyers have historically had considerable ability to influence the nature of the regulation to which their clients are subjected. It is too soon to say whether problem-solving courts will allow criminal defense lawyers similar influence in the long-term.

146. David A. Binder, Albert J. Moore & Paul Bergman, *A Depositions Course: Tackling the Challenge of Teaching for Professional Skills Transfer*, 13 *CLINICAL L. REV.* 871, 883 (2007).

147. *Id.* at 884-87.

scrambling to re-allocate or assume responsibility. Moreover, as much as a teacher might wish to stage students' assumption of responsibility, once a case is open, it is all open. A client in a traditional criminal case is quite likely to want to know at the first meeting with his lawyer what sentence(s) he faces. To answer that, the students need to integrate their understanding of the statutes under which he has been charged, the applicable sentencing schemes, the potential factual developments achievable through discovery and investigation, and many other issues related to the pre-trial, trial, and post-trial stages. The all-encompassing nature of this work is what makes it so exhilarating at the start; so rewarding at the end when, in fact, the students have pulled it all together; and so frustrating when a case ends indeterminately or anti-climactically due to a client's disappearance or re-arrest. Unlike trials, team meetings in problem-solving court are almost certain to happen once scheduled. They are not subject to being negotiated away and they are unlikely to get continued, although the resolution of some issues may be deferred. In fact, because the meetings take place before the clients are due to appear for court, even a client absence—the plague of many clinics working on traditional misdemeanors—will not prevent the meeting from occurring. It is generally easy to identify the issues that will be addressed, and the relevant facts will be shared. Thus, a student ought to be able to begin handling cases in team meetings fairly early in the semester. This relatively short build-up time enables a supervisor to assign cases over the course of the term in light of their complexity. As the student gains confidence, learns from experience, and establishes relationships with the rest of the team, she can take on more challenging work. Of course, the characteristics that make team meetings—like the depositions that Binder, Moore and Bergman use for teaching—easier for students may also render them a less complete or demanding lawyering experience.

#### *D. Finding the Time and a Place for Reflection*

Clinical teachers aspire to do more than train students in the mechanics of effective practice.<sup>148</sup> Anthony Amsterdam described

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148. This is not to denigrate more prosaic subjects, such as how one organizes one's work,



clinical education as perhaps the only means of fulfilling “a major function of law schools . . . to give students systematic training in effective techniques for learning law from the experience of practicing law.”<sup>149</sup> Through structured supervision, which means much more than mere oversight, clinicians aim to teach “rule, doctrine, policy, and procedure.”<sup>150</sup> Taking advantage of students’ immersion in their clients’ cases, faculty guide them to reflect upon and synthesize concepts and extract lessons that may elude them in the less contextualized engagement that occurs in some other courses.<sup>151</sup> Ann Shalleck has described how clinical teachers can assist students to reflect on the interplay between theory and experience:

[Theory] can be helpful in increasing our awareness of the assumptions we bring to representation for women who have been abused, evaluating our emerging conceptions of this representation, fashioning alternative models, identifying lawyering practices through which the models can be realized, and exploring pedagogical methods that would enable students to learn how to provide and critique the practices that the aspirational models describe.<sup>152</sup>

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which contain essential professional lessons and warrant considerable time and attention in a clinic. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (listing management of legal work among fundamental professional skills).

149. Amsterdam, *supra* note 14, at 613.

150. Goldfarb, *supra* note 111, at 1654.

151. Shalleck, *supra* note 14, at 139. Shalleck recalls:

[T]he supervisor used case theory to integrate aspects of the client’s life with the law and the legal system. . . . Case theory provided the entry point for discussing the client’s experience, the students’ understanding of that experience, the judge’s understanding of that experience, the doctrinal structure of the law of domestic violence, and the relationship of the court and the law to that experience.

*Id.*

152. Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019, 1028 (1997).

[T]he work of representing women who have been abused can create a critical vantage point from which to evaluate and challenge the theories about women who have been abused that dominate the legal world.<sup>153</sup>

This type of reflection also teaches students broadly applicable meta-lessons about the relationship between theory and practice and the interplay of power, doctrine, and justice.<sup>154</sup>

The power of reflection as a teaching tool derives from the ability of students and faculty to invest considerable time in the process. Supervision meetings often include a great deal of time spent on aspects of the representation that likely go unexamined in most lawyers' practice, where time is at a premium and consideration of one client's case comes at the expense of those of several others. Describing clinical practice as occurring "in slow motion,"<sup>155</sup> Jane Aiken et al. illustrate this inefficiency (as a form of practice) and value (as a form of learning) by discussing the example of a student team entering a meeting with faculty with differing (and previously unshared) views as to which they should do first: read the case file or interview the client.<sup>156</sup> By forcing the students to resolve this issue, the faculty teach a valuable lesson about how even the most simple practices can contain unexamined assumptions and unexplored possibilities.

Problem-solving courts demand high-speed practice. This not only complicates clinicians' ability to create a reflective environment, it can deprive them of even more basic teaching tools. Clinical teachers regularly reassure students that they can overcome their relative inexperience by exploiting their comparative advantages of time, focused energy, and a limited caseload. "You will know the facts and

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153. *Id.* at 1040.

154. Shalleck, *supra* note 14, at 158 (describing how a teacher's intervention in the discussion of a case with students "invited critique of the institutional setting"); *see also* Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education*, 14 CLINICAL L. REV. 195, 216 (2007) (describing how reflection in case rounds addresses both issues of professional behavior and institutional reform: "In addition to using this process to understand lawyering activity, this process also is essential for exploring the complexities of lawyering for social justice.").

155. Aiken et al., *supra* note 111, at 1054.

156. *Id.* at 1070 n.77.

the law better than anyone else in the case” is a clinician’s mantra and often a frazzled student’s lifeline. The structure of problem-solving courts negates this advantage. Legal issues arise quite rarely. Superior command of the facts may not even be a meaningful aspiration in a world in which “many . . . cases are not dealing with disputed issues of fact.”<sup>157</sup> In these courts, information is generally held in common rather than for advantage. It is also often developed very late in the process, at the team meeting, when the various actors present their updates, creating the composite picture of the participant’s progress which will form the basis of the court’s action.

In theory, clinic students could contact team members and obtain preview versions of their individual reports, thus obtaining a glimpse of the portrait of the client in its embryonic form. However, there is no guarantee that any of these actors will have the information or the opportunity to share it before the meeting. More importantly, asking for such special treatment risks compromising the clinic’s place within the community of the court.<sup>158</sup> Clinicians are accustomed to holding other actors in the justice system to a standard above the everyday norm. Prosecutors anticipate more motions when a clinic is involved. Landlords’ lawyers have a harder time achieving settlement. In these examples, the “clinic difference” is truly a badge of honor. The clinic can credibly claim to be forcing the other actors to raise their level of practice. Requiring early reporting on mental health court clients represented by the clinic cannot be said to promote similar effects. Instead, the extra work is likely to be perceived as redundant, distracting, and just plain baffling. Because the rhythms of problem-solving practice are somewhat at odds with the sort of reflection that Aiken and Shalleck describe, teachers may have to work a bit harder to create an environment in which reflection

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157. Panel Discussion, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 *FORDHAM URB. L.J.* 1790, 1811 (2002).

158. As the Seattle University Mental Health Court Clinic was about to open, the faculty and clinic administrators involved heard from others who worked at the court that the court liaison, one of the critical staff members, had been voicing her concern that the arrival of the students would likely disrupt the work of the team. This woman’s history of commitment to the defendants in the court and the integrity of the process made it impossible to dismiss her concern as the grumbling of a bureaucrat who sought to avoid work or who failed to appreciate the importance of effective defense advocacy.

can take place. This may require a greater reliance on case rounds, “facilitated classroom conversations in which [students] discuss with each other their cases or projects.”<sup>159</sup> In rounds,

students engage with peers in a professional dialogue that reinforces professional reasoning and ethical decision-making. Students learn that the support from a group of other professionals engaged in honest and supportive dialogue can lighten the stresses of law practice. Finally, students develop skills that will enable them to learn from their experience and from other professionals both in the clinic and in their future practices.<sup>160</sup>

Rounds offer students access to the thoughts and experience of the entire class. They also, at least potentially, enable a faculty member to engage in one deep conversation that addresses a common problem from multiple angles and experiences, rather than three or four somewhat similar supervisory conversations, each primarily dominated by the salient features (and unique and often pressing demands) of the particular case in question.

The benefits of operating a problem-solving court clinic will be even greater for schools that already offer (and will continue to offer) clinical opportunities in traditional criminal courts. Because each system (and each role) is more than sufficiently challenging to master on its own, it would be difficult to have the same students simultaneously practicing in both courts.<sup>161</sup> However, the potential for learning from experience in both settings is vast.<sup>162</sup> Rounds sessions with students from both courts would offer a wonderful opportunity to test the assumptions underlying each system and the purported limits on attorney conduct in each. Students might compare notes on subjects such as: (1) the frequency and nature of contact with clients; (2) the occasions on and manner in which students felt

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159. Bryant & Milstein, *supra* note 154, at 196.

160. *Id.*

161. The competency litigation that takes place within a mental health court does provide material within a single clinic for a comparison of the different models of attorney role.

162. See Baker & Zawid, *supra* note 104, at 732 (“Students in traditional placements would be forced to compare the services they were providing with these alternative models. By the same token, however, I expected students in traditional criminal placements to challenge and engage the therapeutic court externs and provide periodic reality checks.”).

they had a chance to advocate for a client and the results they obtained; and (3) indications that either system was achieving its objectives. Much like lawyers in problem-solving court must learn to emphasize some skills over others in their new practice settings, so will clinical teachers need to adjust their approach to ensure that students maximize their learning in problem-solving court clinics.

#### CONCLUSION

Clinical law teachers have long sought to engender within legal practice a more active and shared process of learning. Problem-solving courts can be genuine and multi-directional learning environments. When such courts achieve their goals, participants gain insight into their difficulties and the possible means of overcoming them. Lawyers and other professionals genuinely share their analytical skills and respective bodies of knowledge without fear of surrendering a hard-fought advantage. Judges and court administrators have the opportunity for systematic analysis of the impact of their practices on the lives of those before them.

To date, many in the criminal defense community have resisted the advance of these courts. Part I of this Article called upon defenders to examine their own resistance as critically as they have examined the development of the problem-solving model. In other words, defenders must suspend, if not abandon, the assumptions that the changes wrought by problem-solving courts are both designed and destined to shortchange defendants, in part by eliminating any meaningful role for counsel for the accused. Solid evidence suggests that these courts promise substantial benefits for at least some defendants. It is also apparent that defenders have the opportunity to preserve a distinctive voice, but only if they are willing to move beyond long-entrenched positions, positions that have been the foundation for a robust practice culture and ethos but that do not necessarily respond to the challenges of this modern form of practice.

Clinical teachers and students can plan an important role in guiding the development of the vision and the practice in these courts. With some refinement of traditional clinical pedagogy, problem-solving court clinics can provide the opportunity for students to develop the traditional legal skills of judgment, planning,

and persuasion and the bedrock value of commitment to clients, all in settings that demand and reward emotional intelligence in ways that traditional courts seldom do. Moreover, clinicians' commitment to reflective practice and their roots in the defender community make them potentially valuable contributors to the currently unsatisfactory dialogue between the crusading and currently ascending proponents of these new courts and the still highly skeptical defenders.