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“Specialized Justice”: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm

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*“Power concedes nothing without a demand. It never did and it never will.”*¹

*“One can only imagine what criminal representation would look like if there were no ethical requirement of zealous criminal defense.”*²

*“How arrogant and lazy and convinced of their own infallibility would the prosecution and court become if the defendant had no advocate?”*³

INTRODUCTION

The sentiments embodied in the above statements, unfortunately, represent the everyday reality in some criminal specialty and treatment courts across the

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1. Frederick A. Douglass, Aug. 4, 1857, *available at* http://www.buildingequality.us/Quotes/Frederick_Douglass.htm. Douglass was not speaking of the criminal justice system when he made this statement, but rather the emancipation of North American slaves. The quote appears in several of Douglass’s writings and speeches. *See id.* Though many individuals, groups, and causes use this quote in various forms, it aptly demonstrates the role of the defense lawyer—to demand and protect the rights of the criminal defendant in a criminal proceeding.

2. Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL’Y 83, 128 (2003) (discussing role and significance of criminal defense lawyers in our adversary system).

3. Stanley A. Goldman, *First Thing We Do, Let’s Kill All the [Defense] Lawyers*, 30 LOY. L.A. L. REV. 1, 2 (1996) (noting criminal defense lawyers’ importance).

country. Over the past ten to fifteen years, many judges, court officials, legislators, academics, and other policy-makers confronted with rising recidivism and failed attempts to rid society of “the criminal element,”⁴ embarked upon a campaign to address social problems thought to lead to criminal activity. The so-called specialty courts or “problem-solving courts” are the embodiment of the therapeutic and restorative justice movements at work.⁵ Hundreds of criminal court systems around the country have

4. Statistics show a significant increase in crime during the 1980s and early 1990s. In 1991, the homicide rate rose to 9.8 per 100,000 people. Since 1950, the rate exceeded this level only once. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1950-2002, *available at* <http://www.fbi.gov/ucr/ucr.htm>. Between 1985 and 1995, the reported rate of violent crime increased steadily from 557 per 100,000 people to 685, and peaked at 758 in 1991. U.S. BUREAU OF JUSTICE STATISTICS, REPORTED CRIME IN THE UNITED STATES-TOTAL (1985-1995), *available at* <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm>. During the period from 1985-1995, the estimated number of persons arrested for drug abuse increased by more than nineteen percent. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1985-1995. Several laws and initiatives emerged in an attempt to curb this increase in crime. The Comprehensive Crime Control Act of 1984 drastically changed the federal sentencing system and modified bail and forfeiture procedures. The Crime Control Act of 1990 authorized \$900 million to help states improve their criminal justice systems by funding crime prevention programs and increasing the enforcement of drug laws. Lastly, the Violent Crime Control and Law Enforcement Act of 1994 allotted funds for crime prevention programs, increased the number of federal crimes punishable by death, contained a “three strikes” provision for felons, and permitted the prosecution of juveniles as adults when they commit certain federal offenses. *See* JOANNE O’BRYANT, CONGRESSIONAL RESEARCH SERVICE, CRIME CONTROL: THE FEDERAL RESPONSE 7-9 (Mar. 5, 2003), *available at* <http://usinfo.state.gov/usa/infousa/society/crime/crimegun1.pdf>. In the 1980s and 1990s, this federal legislation prompted some states’ transition from indeterminate sentencing, which allowed judges and correctional officials broad discretion in sentencing and release decisions, to determinate sentencing. *See* Ben Trachtenberg, *State Sentencing Policy and New Prison Admissions*, 38 U. MICH. J.L. REFORM 479, 479-530 (2005) (reviewing state sentencing policies effect on prison populations). The most basic form of determinate sentencing is mandatory minimums, which require a person to serve a set percentage of their sentence regardless of their behavior in prison. By 1996, each state established some form of mandatory minimum covering a wide range of offenses. About half the states use sentencing guidelines that determine sentences based on the offense, the convict’s criminal history, and other factors. States without sentencing guidelines developed other determinant sentencing laws, including “three strikes and you’re out” for felons, broader definitions of criminal behavior, and the abolition of parole. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 4B1.5 (Nov. 2004), *available at* <http://www.ussc.gov/2004guid/g12004.pdf>; *see also* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, 1996 NATIONAL SURVEY OF STATE SENTENCING STRUCTURES 29-30 (Sept. 1998), *available at* <http://www.ncjrs.org/pdffiles/169270.pdf>. In fact, the State of Virginia and the District of Columbia abolished parole for violent offenders in 1994 and 1998, respectively. *See* Truth in Sentencing Amendment Act of 1998, 1998 D.C. Stat. 12-165 (codified as amended at D.C. CODE § 24-403.01 et seq.); *see also* VIRGINIA CRIMINAL SENTENCING COMMISSION, A DECADE OF TRUTH-IN-SENTENCING IN VIRGINIA 2 (2005), *available at* <http://www.vsc.state.va.us/ReptCdPDFfinal.pdf>. Additionally, to combat the proliferation of illegal drugs, Congress passed legislation that equated the possession of five grams of crack cocaine with the possession of five hundred grams of cocaine powder. *See* Comprehensive Crime Control Act of 1984 [CCCA], Pub. L. No. 98-473, tit II, 98 Stat. 1837, 1976 (1984) (codified at 18 U.S.C. §§ 5031-5042). Minnesota was one of several states to introduce crack cocaine statutes similar to the federal statute, but it was struck down due to its discriminatory impact. *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991) (stating “a far greater percentage of blacks than whites are sentenced for possession of three or more grams of crack cocaine under Minn. Stat. § 152.023 with more severe consequences than their white counterparts who possess three or more grams of cocaine powder”).

5. Wendy Davis, *Special Problems for Specialty Courts*, 89 A.B.A. J., Feb. 2003, at 34-37; William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595,

implemented various forms of courts which offer the promise of “specialized justice,”⁶ to address a myriad of social issues, including drug addiction, domestic violence, sexual dysfunction, nuisance crimes, and homelessness.⁷ An unintended and, as yet, largely ignored consequence of this burgeoning movement, however, may spell a threat to our adversary system. The standard premise behind these courts is the emasculation⁸ of the traditional role of the criminal defender as a zealous advocate fighting against the system. Despite the importance of defenders insuring courts adhere to principles of substantive and procedural due process, the defender in specialty courts becomes, in most instances, a collaborator. He collaborates with the judge and prosecutors, thereby taking on a role that works to diminish the effectiveness of the defender overall, decreases the confidence defendants have in the outcome, and supports a culture of ineffectiveness and under-representation. More importantly, citizens most in need of justice and traditionally overrepresented in the criminal justice system⁹ may be adversely affected the most by this turn of events.¹⁰

1602 (2003); see also Candace McCoy, *The Politics of Problem Solving: An Overview of an Origins & Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1513 (2003). These courts have also been called “specialization of the judiciary,” “treatment courts,” “specialized courts,” boutique courts, and therapeutic courts. See *infra* Part II.

6. “Specialized justice” refers to the notion of individualized, treatment-oriented, and problem-solving processing of cases and defendants through the criminal justice system.

7. Judge Morris Hoffman of Colorado believes that there are thousands of these courts in operation today. See Morris B. Hoffman, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567, 1568 (2003) [hereinafter *A Neo-Retributionist Concurs*]; see also Timothy Casey, *When Good Intentions are Not Enough: Problem Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1459 (2004); Rodger M. McDaniel, *Problem Solving Courts: A Role for the Judiciary in Meeting the Needs of Wyoming Children and Families*, 27 WYO. LAW., Dec. 2004 at 28;. Specialization in criminal courts has some counterparts in the civil court systems. For example, New York City established a commercial litigation court in the mid 1990s to hear breach of contract cases, and Los Angeles has explored establishing a business court to handle complex litigation. Civil specialty courts have won some praise and have also raised some concern. Davis, *supra* note 5, at 37-38. Additionally, Oregon has a state tax court and several administrative boards, such as the Land Use Board of Appeals and the Workers’ Compensation Board that both have some court-like features and functions. Janine Robben, *Who Decides?: Specialized Courts vs. the Jury of Peers*, OR. ST. BAR BULL., Apr. 2005, at 9. Irrespective of the implementation of specialty courts in the civil context, criminal specialty courts present more issues because they deal with fundamental constitutional rights and the liberty interests of clients. See Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2071 (2002) [hereinafter *Therapeutic Jurisprudence*]. Beginning in the late 1800s, juvenile courts were the first in the genre of specialty courts. This article makes no attempt to evaluate or address juvenile courts, but rather looks at the modern wave of specialty courts thought to have emerged with the first drug court in Miami in 1989. Drug courts, as a model of specialty courts, have become widespread, garnering the most attention, praise, funding, and analysis. Given their favored status by government funders, judges, attorneys, and some politicians, the level of criticism of drug courts has been low, and the model of treatment-based adjudication of cases serves as a model to deal with other issues in the criminal justice system.

8. I have intentionally used this strong word to describe what may be happening in some specialty courts because there is a danger that the traditional criminal defender will disappear in these courts and be replaced by a “team player.” See *supra* Parts II & III.

9. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 148 (1997). Randall Kennedy has pointed to a number of factors that contribute to the overrepresentation of minorities in the criminal justice system. *Id.* First, race has unduly become a proxy for an increased likelihood of criminal behavior. *Id.* Second, minorities

Statistics and research from specialty courts indicate that indigent criminal defendants and those from racial and ethnic minority groups are often over-represented in specialty courts, thus bearing more than their fair share of the danger of indifferent representation.¹¹

In the majority of criminal specialty courts that have been developed and implemented in recent years, the defense lawyer is relegated to the role of team player whose only purpose serves to fulfill a constitutional mandate.¹² A client may face a significant period of incarceration due to a defender who does not zealously advocate for the dismissal of the case in appropriate circumstances, does not expose and challenge police abuse and illegality, does not voice the client's position, and does not challenge the automatic imprisonment of the defendant as a sanction for failed compliance.

Many other adverse consequences may also exist. Consider the following scenario that might occur in the courthouse hallway just prior to a defendant's first appearance in court on a misdemeanor drug possession case carrying a maximum penalty of 180 days in jail:

Attorney: Hello Mr. Defendant. My name is Attorney Advocate and the court has appointed me to represent you. To get done with this charge quickly, I think the best thing for you to do right away is to enter the community court

have been adversely affected by discrimination in the jury selection process. *Id.* Third, analysis of relevant case law indicates a trend of prosecutors making racial appeals to the detriment of minority defendants in court. *Id.* Fourth, it has been demonstrated that prosecutors often charge minority defendants more harshly than they would others. *Id.* Fifth, individual judges have contributed to the overrepresentation of minorities in the criminal justice system with racially motivated sentencing decisions. *Id.* Lastly, federal and state anti-drug laws have had a discriminatory impact. *Id.*; *Russell*, 477 N.W.2d at 887 (stating "a far greater percentage of blacks than whites are sentenced for possession of three or more grams of crack cocaine under Minn. Stat. § 152.023 with more severe consequences than their white counterparts who possess three or more grams of cocaine powder"). The results of these factors are that minorities, especially Blacks and Mexican Americans, are several times more likely to be arrested and incarcerated than Whites. *See generally* RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997) (detailing ways in which racism permeates U.S. criminal justice system). This problem is evident in the fact that while Blacks comprise twelve percent of the U.S. population, forty-four percent of all prisoners in the United States are Black. Matthew R. Durose, David J. Levin, & Patrick Langan, *Felony Sentences in State Courts*, BUREAU OF JUST. STAT. BULL. (Oct. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/fssc98.txt>. Also, in twenty states the percentage of incarcerated Blacks is at least five times greater than their share of the resident population. Daniel Gray, *New Studies Point to Crisis Among African American Men*, TENN. TRIB., May 5, 2005, at 13A.

10. *See* National Association of Drug Court Professionals, Resolution adopted by the Board of Directors, June 2001. The dangers of lackadaisical representation have seemingly been recognized by several groups who are champions of the specialty court movement. *Id.* For example, the National Association of Drug Court Professionals has enacted a resolution regarding indigent defense in drug courts. *Id.* Moreover, the National Legal Aid and Defender Association, a group that has been cautiously optimistic regarding these courts, has addressed this issue in several publications. JIM NEUHARD & SCOTT WALLACE, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS (Jan. 1, 2002), available at http://www.nlada.org/DMS/Documents/1019501190.93/document_info (providing guidelines to increase fairness and effectiveness of problem solving courts).

11. McCoy, *supra* note 5, at 1513. *See generally* Hoffman, *Therapeutic Jurisprudence*, *supra* note 7.

12. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (mandating right to counsel for indigent defendants).

program of community service and drug treatment. I've already talked to the prosecutor and he is willing to let you enter the program as long as you plead guilty to the charge and abide by the conditions of the program. You've been through this before, so let's just go in and plead . . .

Defendant: You want me to plead guilty right now? I don't even know what evidence they have against me. How can I make that decision right now? Don't you have to get discovery or something? What am I charged with?

Attorney: Well, you know you were picked up for drugs. We don't really need to do any discovery right now because you've been offered this really good new program. You can go into a treatment program, and get off the drugs. You'll have to do some community service too, but that's not much. Not many people get this opportunity and we have to jump on it fast, because you might not get this offered to you later on. All we have to do is go in there and let the judge know that you want the program. Then she'll take your plea, you get released and start your treatment and community service.

Defendant: You're sure I'll get released if I enter the plea? You know I have a record.

Attorney: Well, all I know is that the prosecutor told me you have a prior felony drug conviction. The program works just like I told you. You have to be released to get the treatment.

Defendant: You keep saying treatment, treatment, treatment. What kind of treatment is it? How long is it? Do I go everyday? I have two small kids to take care of. I can't do community service every day.

Attorney: Its drug treatment. They do an assessment and decide what kind you need—what's appropriate for you.

Defendant: Who is "they"? Will it be group meetings, outpatient or what? I don't really need treatment; I'm not addicted. I was just caught holding some marijuana.

Attorney: Well, they always order treatment in these cases, so you're gonna have to do it anyway. The case will be called soon, so you have to sign this guilty plea form and waiver of jury trial. Take it and sign it. I have to go talk to some other clients that I have. I'll be back.

Defendant: But wait! Aren't we going to talk about the evidence they have against me? I think the police violated my rights when they stormed into my house.

Attorney: We can't get into that right now. We don't have time. If you don't want the program, then we can see if they violated your rights, but my experience in these cases is you do better if you just take the program. My advice is this is the best way to insure that you get out and don't get a bond today.

Defendant: I don't know. This is a big decision to make in just a few minutes. So, I won't get stepped back anytime in the program?

Attorney: Well, if you test positive or don't do the community service, there

are sanctions, but not much. At most its just a few days in jail.

Defendant: A few days in jail is a lot to me! I told you I have kids and I can't afford a babysitter.

Attorney: Well, we have about ten minutes before the case is called. I'll go talk to my other clients and you can talk to that program counselor over there (pointing). She can probably answer your questions and go over the forms with you.

Defendant: Okay. I can still challenge what the police did, right?

Attorney: No, because you have to plead guilty for the program. Just talk to the counselor, first. I'll be right back.

While the above scenario is fictional, it is representative of numerous accounts from clients that I have interviewed, lawyer-client interactions that I have witnessed in the hallways of the courthouse, and from some lawyers who believe that this is the correct approach to criminal defense practice in some specialty courts.¹³ This scenario presents many ethical, attorney competence, and zealotry issues.¹⁴ Similar interactions between clients and defense attorneys in these new specialty courts are unfortunately the norm and not the exception.

With the advent of the first drug court in Miami, Florida, in 1989, court systems in many states and localities created specialty courts, which seek to address the need for services and problems in defendants' lives that bear upon their ability to follow court orders and remain free of the criminal justice system. Some of these courts seek to integrate the community's voice in determining appropriate penalties and behavior modification systems that will appease community members as well.¹⁵ Amidst these laudable goals, few have

13. I previously practiced for many years as a public defender in the District of Columbia Superior Court, and I currently practice as a clinical law professor. I had clients charged with all types of crimes and subject to all types of penalties, including some who have been processed in various specialty court models. The fictional scenario above reflects a conglomeration of what I saw and heard from clients, other lawyers, client family members, and student attorneys.

14. Many defender quality and ethical issues are apparent in this scenario, such as advising a client on a course of action without proper investigation and research, poor client interviewing skills, and non-protection of client confidentiality. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1247-48 (1998). Some may even rise to the level of ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

15. The Red Hook Community Justice Center in Brooklyn, New York, is often cited as an example of how a community can become vested in a problem-solving court. Red Hook has had many success stories and is often regarded as a shining example of the community court movement. See *Red Hook Justice* (Public Broad. Sys. 2003); see also Red Hook Justice, www.pbs.org/independentlens/redhookjustice/community.html (last visited Nov. 5, 2006) (focusing on experimental court in Red Hook, New York). There are many other questionable examples of specialty courts that are operating with the support of segments of the community. Privately funded specialty courts operate in several central business districts around the country and are supported financially by businesses and corporations. These businesses and corporations also receive direct benefits from the specialty courts, because defendants are often given sanctions which include community service jobs, such as removing graffiti and landscaping public areas. See Sundip Kundu, *Privately Funded Courts and the Homeless: A Critical Look at Community Courts*, 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 170, 173-74 (2005).

ventured to comment on the abandonment of the notion of adversarial justice in favor of a more treatment-oriented approach that emphasizes the team concept. Such an approach finds its roots in, and has been accepted by, other social science disciplines such as psychiatry, and is tied to several academic approaches to criminal law theory, namely rehabilitation, therapeutic jurisprudence, and restorative justice.¹⁶ But the approach carries potential danger for the indigent or racial minority defendant who is counting on a committed zealous defender to be their voice, their sword, and their shield in the criminal justice system. The wide acceptance and silence regarding this model of criminal defense representation signals a change in the way our criminal justice system works.

Defenders, who litigate in these courts, encounter a dilemma between their instinctual desire to be an advocate for their clients and the desire to do whatever they can to seek treatment for their clients and keep them out of prison. As difficult as this dilemma is for a good number of committed defenders, an even more interesting issue concerns whether the nature of the treatment court and defenders' role in it negatively affect clients' interests by instigating a culture of indifference and incompetent advocacy.

Much debate can be found throughout legal literature concerning the efficacy of our adversary system and the role of the defender in the system.¹⁷ Various legal scholars question the effectiveness of our system, pointing to its divisiveness on race and gender issues,¹⁸ its disregard of the "search for truth,"¹⁹ its resource-intensiveness and problematic functioning. However, very little has been written about the role of the defense lawyer in the new non-adversarial problem-solving courts.²⁰ In fact, a review of the literature suggests that few legal scholars, court administrators, judges, and policy officials are willing to critique the effect of these courts on the litigants, the administration of justice, and the criminal justice system as a whole.²¹ While

16. See Hoffman, *Therapeutic Jurisprudence*, *supra* note 7, at 2067-68; Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 98 (2002).

17. See Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 974 (2004).

18. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern Multicultural World*, 38 WM. & MARY L. REV. 5, 9 (1996).

19. See generally Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 406 (1992).

20. See generally Cait Clarke & James Neuhard, *From Day One: Who's in Control As Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11 (2004); Thompson, *supra* note 16.

21. Several articles have been written, roundtable discussions transcribed, and reports developed about the efficacy of drug courts and their appropriateness as a model for this new type of court. The work has been primarily conducted by groups and individuals who are supportive of the model, either because of their status as a government agency funding these courts, as a judge who sits on these courts, or as a non-profit agency or association who promotes these courts. See generally THE NAT'L ASSOC. OF DRUG COURT PROFESSIONALS, DEPT. OF JUSTICE (1997), *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997) [hereinafter *DEFINING*

some bold legal scholars and attorneys question the role of the criminal defense lawyer in these courts and call for more discussion and analysis of this crucial issue,²² there still remains little academic discourse on the issue. This article will focus on the concept of the adversarial defender and the question of the proper role for that defender in specialty courts. Part I of this article examines the foundations of our adversary system and some varying philosophies regarding the role of the defense attorney. Part II discusses the practical reality of specialty courts and the changed role of the defense attorney who works in those courts. Finally, Part III sets out the major reasons why it is imperative that we critically examine this changed role of the defense attorney in specialty courts. This trend toward “specialized justice” is examined to determine if it can meet the need for competent and zealous criminal defense. Because academic discourse needs to explore real-world solutions, the article follows with a discussion of the dangers of this changed defender role. It finally concludes with an argument that specialty courts should not be completely abandoned,²³ but must move away from the team-player mandate toward defenders who are adversarial and zealous when litigating in specialty courts.

PART I: THE ROLE OF THE CRIMINAL DEFENSE LAWYER IN THE ADVERSARY SYSTEM

Our adversary system of justice in the United States cannot function without the criminal defense lawyer.²⁴ In the criminal justice system, the defense lawyer is essential to keep the system honest and protect the interests and rights of the accused. Case law, scholarly commentary, and popular writings extol the criminal defense lawyer and her mission.²⁵ Depictions of the criminal

DRUG COURTS], available at <http://www.nadcp.org/docs/dkeypdf.pdf>; Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 13, 1999, at 13; Office of Justice Program, Mental Health Courts Program, <http://www.ojp.usdoj.gov/bja/grant/mentalhealth.html> (last visited Nov. 5, 2006); Center for the Community Interest, Working With Courts and Prosecutors, http://www.communityinterest.org/neighborhoodsafety/resources/lawenforcement/working_with_courts_and_prosecut.htm (Dec. 2004). There seem to be a smaller number of articles or studies written by academics or independent organizations. See McCoy, *supra* note 5, at 1519 (noting some agencies have an “agenda” to promote development of drug courts). See generally Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13701 (2000) (providing funds for state courts to implement drug courts).

22. Mae 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, 37 (2001); Kundu, *supra* note 15, at 180.

23. See *infra* Part VI. While some of the basic concepts of these problem-solving courts—specifically, their concentration on treatment and addressing social issues should, and can, be adapted to all courts in the criminal justice system—some urgent reforms are needed. *Id.*

24. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS L. REV. 57, 60-68 (2005). The American adversary system includes several key features: disputes are resolved by an impartial decision maker after a presentation of the merits by partisans who present their respective positions, and litigants are seen as more “in charge” of the process. *Id.*

25. See *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (explaining defense counsel’s fundamental role); see also *supra* notes 2, 3 and accompanying text (demonstrating necessity of criminal defense attorney). See generally Cristina C. Arguedas, *Duties of the Criminal Defense Lawyer*, 30 LOY. L.A. REV. 7 (1996)

defense lawyer can be found everywhere in our society; she is the subject of folklore, the central figure in media headlines, the protagonist in fictional television stories, the sometimes tragic and misunderstood character in blockbuster movies.²⁶ Judges, prosecutors, politicians, the media, and community members both respect and malign the criminal defense attorney. At any given time, the actions and calling of criminal defense attorneys, and particularly those that represent the indigent, are the subject of debate concerning standards of practice, ethical boundaries, and the breadth of their professional role.

Scholars debate the traditional view of the criminal defense attorney, her role and ethics in our legal system. The prevalent view has been clearly espoused by Professor Monroe Freedman in several seminal articles and books on the subject.²⁷ Professor Freedman's concept of the criminal defense attorney holds true every time I am appointed to represent a person accused of a crime; I am a partisan committed to the client and the client's expressed interests, whose zealotry and commitment to defend the client's rights is untempered and unmitigated. Freedman's criminal defense lawyer is unabashedly adversarial because there is no other avenue that will achieve her necessary ends. Those necessary ends are not just for the client, but because the criminal defense lawyer zealously and competently safeguards the client's position in the case, society's most precious rights and principles are upheld.²⁸ This traditional notion of the criminal defense lawyer and defense of the adversarial system is well supported in history and by legal scholars and

(providing examples of criminal defense counsels' responsibilities); Abbe Smith, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443 (1999) (describing nobility of criminal defense work throughout article).

26. Contemporary high profile criminal cases involving celebrities provide some of the most well-known examples: for example, Johnnie Cochran, the lead attorney in the O.J. Simpson trial; Pamela Mackey, who represented Kobe Bryant in recent rape allegations; and Mark Geragos, who initially represented Michael Jackson and later tried the Scott Peterson murder trial.

Contemporary television series provide examples of criminal defense lawyers that range from comedic representations, as in *Ally McBeal*, to dramatic portrayals of attorneys, like Bobby Donald and Eugene Young in *The Practice*. These examples even go so far as to depict inept, ineffective, and unethical examples of defense lawyers in *Law & Order* episodes. Movies contain many examples of defense attorneys, from a public defender with a deaf client in the movie *Suspect*, to a military attorney in *A Few Good Men*. The classic example of the committed defender is Atticus Finch in *To Kill A Mockingbird*. See PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES (2006).

27. See Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 HOFSTRA L. REV. 1167, 1168 (2003); Monroe H. Freedman, *How Lawyers Act in the Interests of Justice*, 70 FORDHAM L. REV. 1717, 1718-19 (2002); Monroe H. Freedman, *Ethics, Truth, and Justice in Criminal Litigation*, 68 FORDHAM L. REV. 1371, 1378 (2000); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 58 (1998); Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112 (1995).

28. See Smith, *supra* note 2, at 87. Freedman seems to suggest that the right to counsel is the starting point for many other rights in the criminal justice system, including the right to trial by jury, right to confront witnesses, right to be free from compelled self incrimination, and the presumption of innocence. *Id.*

practitioners.²⁹ Although it has been recast in different language, the underlying principles set forth by Freedman remain. Some cast the role of the criminal defense lawyer as a champion against the might and power of the state. These writers find support for a completely adversarial defense lawyer “whose loyalties must lay with the accused” as a necessary “bulwark against the possible overreaching of a sometimes too eager and powerful government.”³⁰ Some see the job as essential to maintain the integrity of our criminal justice system. The defender’s job is to “police the police, to audit the government, to speak for the accused, to fight for fairness and to rail against injustice.”³¹ In this conception, the criminal defense lawyer becomes David—the weaker, smaller opponent whose only weapon is the courage and strength to stand up for ideals and principles—against the prosecution’s Goliath.³² The defense attorney is then empowered to fight for the client’s wishes; even though the defense can win by getting a not guilty verdict, that is not always the ultimate goal. Rather, ensuring procedural fairness and attention to the defendant’s constitutional rights is of the utmost importance.³³

Some writers embrace the notions of client-centered lawyering, where the defender’s mission is to carry out the client’s goals to the extent that they do not run afoul of ethical and legal requirements. This picture of an “aggressive defender” as some critics have labeled her, is duty-bound “to defend her client vigorously, aggressively and completely, within the bounds of the law.”³⁴

There are many who criticize and disavow Freedman’s view of the criminal defense lawyer. Some are critical of the traditional view of the defender as too aggressive.³⁵ These scholars note the aggressiveness of all attorneys in our current adversary system. Professor Harry Subin calls it “ritualized aggression,” and points to excesses in the system becoming the norm, rather than the exception.³⁶

Some scholars reject the traditional view because they see the loyalty of the defender as equally divided among a duty to the client, duty to the court, and

29. Johnnie L. Cochran, *How Can You Defend Those People?*, 30 LOY. L.A. L. REV. 39, 42 (1996); Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1242 (1993).

30. Goldman, *supra* note 3, at 2.

31. Cochran, *supra* note 29, at 42.

32. Goldman, *supra* note 3, at 9.

33. The defense bar’s mandate to ensure adherence to procedural justice principles is seen by a great number of defense attorneys as more important than winning trials. This makes sense given the small number of cases that actually result in a trial and result in a not guilty verdict.

34. Arguedas, *supra* note 25, at 7; *see also* WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS ETHICS* 77 (1998); Michael P. Judge, *Critical issues for Defenders in the Design and Operation of a Drug Court*, IND. DEF., Nov.-Dec. 1997 (stating “defense function in the traditional adversarial system is to resist the government’s charges and to avoid or minimize loss of liberty or other sanctions”).

35. Smith, *supra* note 2, at 91 (noting Freedman’s view of zealous defense attorneys).

36. Van Kessel, *supra* note 19, at 435. Van Kessel is an advocate of a non-adversary approach similar to some European systems. *See id.* at 435-58.

duty to the ethical boundaries that regulate the practice. For example, Professor Peter Fleming finds that the lawyer's responsibilities do not, and should not, end with the client, but rather continue to the court and the jury, which is the final arbiter.³⁷ He finds an overriding responsibility to "be fair and square with the evidence."³⁸ Professor Carrie Menkel-Meadow also explores the notion of the neutral lawyer who has neither client nor partisan cause, but who is able to build consensus and achieve or facilitate resolutions to disputes that further the goals of justice.³⁹

Among the critics of the traditional view, Professor William Simon finds that Freedman's traditional or "Dominant View," as Simon calls it, may be the prevailing approach to describing a lawyer's role and ethical responsibilities, but that it is flawed.⁴⁰ Simon believes that the approach is too rigid and restrictive and does not allow lawyers to account for the range of considerations that confront a lawyer as a decision maker.⁴¹ Simon argues that ethical decisions by lawyers should turn on "the underlying merits." His "Contextual View" compels the lawyer to take actions, such as considering the relevant circumstances of the particular case that seem likely to promote justice.⁴²

Many lawyers who practice criminal law want to promote justice in a general sense; however, some contend that such a goal is more nuanced and difficult in the area of criminal law.⁴³ Simon, however, argues that the "Contextual View" is applicable to all lawyers, and he explicitly finds no merit in the notion that criminal defense is different or that defenders should be treated differently.⁴⁴ A criminal defense attorney in Simon's "Contextual View" frames his client's wishes by reference to how they promote justice in a particular context.⁴⁵

Professor Simon addresses the role of defenders in specialty courts and finds that such an innovative change in the criminal justice system may be positive, but may require lawyers, especially defenders, to reinvent the way they see themselves.⁴⁶ Simon argues that team models embodied in drug courts raise problems, if they require "lawyers to violate ethical commitments fundamental to their role," or if the new skills lawyers have to embrace are similar to skills

37. Peter Fleming, Jr., *What Makes Us Different?*, 30 LOY. L.A. L. REV. 45, 45 (1996).

38. *Id.*

39. Carrie Menkel-Meadow, *The Lawyer's Role in Deliberative Democracy*, 5 NEV. L. J. 347, 349-50 (2004).

40. SIMON, *supra* note 34, at 7-8.

41. SIMON, *supra* note 34, at 9.

42. SIMON, *supra* note 34, at 9. Simon also notes an alternative approach, the "Public Interest View," which holds that "law should be applied in accordance with its purposes, and litigation should be conducted so as to promote informed resolution on the substantive merits." *Id.* at 8. Simon describes the Public Interest View as rejecting the manipulation of form to defeat relevant legal purposes. *Id.* at 8.

43. *See* Smith, *supra* note 2, at 86.

44. SIMON, *supra* note 34.

45. *See* SIMON, *supra* note 34.

46. *See* Simon, *supra* note 5, at 1595.

employed by lawyers outside of the criminal realm.⁴⁷ He concludes that the new courts do not require defenders to compromise their ethical responsibilities and the new skills they acquire are appropriate for lawyers in the criminal justice system.⁴⁸

Reviewing the specialty court's model of defense lawyering by inquiring into new skill sets required of practitioners may not be an extensive enough measure. The need for defenders to acquire new skills is not a new or novel idea, but rather one that has been around for a very long time.⁴⁹ Many defenders recognize that in order to fully represent a client throughout all phases of the criminal justice system, they must take on various roles, including counsel, advisor, social worker, educator, and contract negotiator. When a defender takes a case to trial, particularly a serious felony case, the defender must learn the subject matter of many disciplines, including medical and physical science. In order to fully investigate a case or to seek an appropriate disposition or favorable sentencing outcome, the defender must think like a community organizer. It is nothing new that a defender must develop and nurture a plethora of skill sets. This is essential for the defender who fully and zealously represents clients in any court, including those of general jurisdiction or specialty courts.

Many defenders, however, question the team model through the ethical lens and find that defense representation in specialty courts may present a number of ethical challenges.⁵⁰ In a great number of specialty courts, defenders who participate according to the recognized and sanctioned model of those courts may well be violating "fundamental ethical commitments," and may be forced into a practice that ignores the client-centered model of representation that is predominant in the field.⁵¹ Such a practice may violate the duty to competently and zealously represent a client, represent the client with diligence and promptness, maintain client confidences and secrets, or eschew practice that continues a conflict of interest.⁵²

Professor Simon's "Contextual View" bears a resemblance to the lawyer model that is embraced by specialty court advocates. Specialty court advocates

47. See Simon, *supra* note 5, at 1595-96.

48. See Simon, *supra* note 5, at 1597.

49. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 677 (2005) (citing Edward D. Shapiro, *Fresh Perspectives: The Practice of Holistic Lawyering*, CBA REC., Feb.-Mar. 2002, at 38). The notion of "holistic lawyering" in the criminal defense context recognizes that lawyers may have to focus on the "whole client," including non-criminal law problems. See *id.*; see also Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 409 (2001).

50. Quinn, *supra* note 22, at 50-54.

51. See Simon, *supra* note 5, at 1597; Jane Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem Solving*, 40 AM. CR. L. REV. 1617, 1618 (2003).

52. See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.4, 1.6, 1.7. Other ethical rules and proscriptions may also be jeopardized.

find that “adversarial advocacy is too adversarial,” and promote a model of the criminal defender that focuses on collaboration and partnership; one in which traditional adherence to rights and challenges to government action are foregone in the name of treatment or problem-solving.⁵³ Specialty court proponents replace common notions of procedural justice and fairness with a resolution to succeed in treatment or problem-solving goals mandated by judges or treatment professionals. Justice in specialty courts focuses more on results than process, and the results may include treatment success for an individual client or wide ranging results such as a decrease in recidivism.⁵⁴ Such a retreat from traditional notions of procedural fairness may be dangerous in any court context, even one which focuses on beneficial treatment for defendants. In the criminal justice system, the defendant risks his life and liberty, faces stigma in the community, and is at a disadvantage in terms of resources and bargaining power.⁵⁵ An attempt to insure procedural fairness and institute a model that recognizes and supports procedural safeguards should be an essential component of specialty courts. Likewise, a careful review of the ethical challenges noted by defenders may result in the need for structural change in the prevailing specialty court model.

PART II: THE NATURE AND FOUNDATIONS OF TREATMENT COURTS

Many officials and scholars theorize that frustration with the adversary system has in large measure led to the proliferation of specialty courts.⁵⁶ Upon closer review, however, it seems there are other reasons for the significant development in the administrative access to justice. Court officials, judges, and lawyers often report frustration with the “revolving door” of the courthouse, where charged persons are processed through the court on one charge and then

53. See Smith, *supra* note 2, at 93.

54. Hardcastle, *supra* note 24, at 57. Justice in a specialty courts, like in other courts, is seen by many as subjective. *Id.* at 69-71. Chief Judge Judith Kaye, an advocate for specialty courts, agrees that the public’s perception of justice depends upon their perception of how a court is run and whether citizens are treated fairly. Such a perception places great weight on the notion of procedural fairness. Therefore, the protection of rights and general interests of a defendant should be at the forefront when determining how the court system operates. *Id.*; see also, Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts are Run*, 48 HASTINGS L.J. 851, 853 (1997). Unfortunately, whatever conception of justice or lawyering is accepted as preferred in the criminal justice system, problems still persist with the quality of the lawyering especially for indigent criminal defendants. See DEBORAH L. RHODE, ACCESS TO JUSTICE 12-13 (2004); Pearce, *supra* note 17, at 973. This problem may have been transported to the specialty courts through rejection of the traditional conception of lawyering and its structure. In the specialty court context, I fear the same dangers noted more generally by Professors Smith and Luban, namely that too many indigent criminal defense lawyers do not engage in zealous advocacy and are not competent to provide adequate legal representation.

55. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1733 (1993); Smith, *supra* note 2, at 107-10.

56. See Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1439 (2000). Some also cite its ineffectiveness at addressing substance abuse issues which are prevalent among those who are subject to the coercive power of the criminal justice system. See DEFINING DRUG COURTS, *supra* note 21.

a short time later on another.⁵⁷ Other reasons include the desire for increased court efficiency, better management of court dockets, and a desire to minimize the costs of the administration of justice, such as costs associated with building more and more prisons to warehouse offenders.⁵⁸ Some point to the overcrowded jails and prisons, where incarcerated persons learn to commit more dangerous crimes upon release, and whose release is dictated by unfair and unjust mandatory minimum sentences and sentencing guidelines.⁵⁹ The desire to reduce recidivism and better communities by decreasing quality of life crimes and increasing the defendant's accountability to the grassroots community is important.⁶⁰ This sometimes includes the desire to transform a community into a more economically productive one. Still, other theories exist that focus on politics and political ambition as the driving force behind the proliferation of some specialty courts. Some even point to the dissatisfaction of judges and lawyers on both sides of the table, who are unhappy with their jobs and feel that they are not making a difference.⁶¹ Whatever the reasons for the proliferation, it seems clear that the movement toward "specialized justice" is here to stay, and may well expand into areas never thought of before.⁶²

While many stakeholders in the criminal justice system have been instrumental in the formation of these courts, few activist defender agencies or defense lawyers have called for the implementation of these courts or played a prominent role in their initial design and development. Generally, the activist defense bar has been wary of the heavy reliance on sanctions, the increased role of the judge, and the non-adversarial nature of these courts.⁶³ In order to examine these and other concerns for the defense in specialty courts, it is necessary to examine the foundations of the specialty courts, the goals they were initially designed to accomplish, the manner in which these courts

57. I can remember, as many others who have been or are public defenders can no doubt relate, instances where a case is disposed of in court one morning with the defendant receiving a probationary sentence, and then receiving a call that same afternoon from family members, probation staff, or the court indicating that the same client has been rearrested on a new charge. See DEFINING DRUG COURTS, *supra* note 21; see also James L. Nolan, *Redefining Criminal Courts: Problem-solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1541 (2003); Laurie O. Robinson, *Community Court and Community Justice Commentary*, 40 AM. CRIM. L. REV. 1535, 1535 (2003).

58. Nolan, *supra* note 57, at 1541; McCoy, *supra* note 5, at 1517-20; DEFINING DRUG COURTS, *supra* note 21. Professor McCoy calls it the "case overload crisis . . . caused by the War on Drugs," and argues that it has led to a "management rationale" for the proliferation of specialty courts. McCoy, *supra* note 5, at 1518.

59. McCoy, *supra* note 5, at 1518.

60. McCoy, *supra* note 5, at 1518.

61. Nolan, *supra* note 57, at 1541.

62. Drug courts are entrenched in the court landscape. Some writers have estimated that there are over 1,700 across the country. See Casey, *supra* note 7, at 1459. Not surprisingly, some localities abolished or modified their drug courts when early results did not show the great reductions in recidivism that had been expected. Hoffman, *A Neo-Retributionist Concurr*, *supra* note 7, at 1567 (commenting on the example of Denver's drug court which was disbanded). Moreover, states will have to institutionalize funds into local budgets to keep courts going when federal funds are discontinued. See *infra* Part III.

63. See Clarke & Neuhard, *supra* note 20, at 19; Thompson, *supra* note 16, at 81 n.92.

actually work, and how these issues relate to the role of the defender in specialty courts.

A. Foundations of the Specialized Justice Movement

The trend to establish problem-solving courts began with the decline of the rehabilitative model of jurisprudence and the development of “therapeutic jurisprudence” and its sister theory, restorative justice.⁶⁴ These new theories are well-rooted in concepts of rehabilitation, although the traditional concept of rehabilitation has largely fallen out of favor.⁶⁵ Therapeutic jurisprudence and restorative justice theories emphasize that treatment is a desired goal of justice. Those theories maintain that the appropriate treatment will be provided by the court system, primarily because other governmental and social systems have failed to provide adequate social services, treatment, or incentives to insure that individuals do not resort to criminality. In essence, therapeutic and restorative justice regimes combine social work with law and attempt to correct the failures of social services systems.⁶⁶ Therapeutic jurisprudence theorizes that a closely controlled program of treatment results in less recidivism among offenders. The “treatment” addresses the problems or issues that led to the defendant’s involvement in the criminal justice system and undertakes the appropriate treatment to cure or lessen the effects of the issues. Restorative justice principles focus on whether the regimen can restore all actors or

64. McCoy, *supra* note 5, at 1513. According to several commentators, the rehabilitative model was abandoned in the 1970s when many scholars questioned whether the prison environment was suitable for rehabilitation, reform, and treatment of offenders. Greg Berman & Anne Gulick, *Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma’am: What We Know and Don’t Know about Problem-Solving Courts*, 30 FORDHAM URB. L. J. 1027, 1027-28 (2003) (citing Robert Martinson seminal, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INT. 22 (1974)). See generally Hoffman, *A Neo-Retributionist Concurr*, *supra* note 7. Given the demise of the rehabilitative ideal, many different approaches were attempted to combat crime and recidivism. Rehabilitation was traditionally coupled with indeterminate sentencing, a sentencing structure that gave prison officials too much authority to determine the release of an incarcerated inmate. Legislators, judges, and court officials addressed indeterminate sentencing by enacting harsh sentencing schemes including the federal sentencing guidelines, the abolishment of parole, development of mandatory minimums, as well as the proliferation of the war on drugs. The rise of specialty courts and the therapeutic ideal is a response to the recent sentencing schemes in the United States, which resulted in inequity and injustice. See McCoy, *supra* note 5, at 1513 (discussing historical perspective on development and rise of “problem-solving” courts); see also *supra* note 4. Many believe the concepts of “therapeutic jurisprudence” and restorative justice were first introduced by Professors Bruce Winick and David Wexler in the 1980s. See Hoffman, *A Neo-Retributionist Concurr*, *supra* note 7, at 1568-70.

65. NATIONAL DRUG COURT INSTITUTE, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT 1 (Apr. 2003), available at <http://www.ndci.org/CriticalIssues.pdf>; JIM NEUHARD & SCOTT WALLACE, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS intro. (Jan. 1, 2002), available at http://www.nlada.org/DMS/Documents/1019501190.93/document_info.

66. Jenny B. Davis, *What I Like About My Lawyer: Happy Clients Speak Out on What Sets Their Lawyer Apart*, 89 A.B.A. J., Jan. 2003, at 33. Professor Winick notes that when therapeutic jurisprudence was being developed, he attempted to see “if the law could be reshaped to make it into more of a healing force, a therapeutic force.” Panel discussion, *The Changing Face of Justice: The Evolution of Problem-Solving*, 29 FORDHAM URB. L.J. 1790, 1809 (2002) (highlighting comments of Bruce J. Winick).

stakeholders in the system, including defendants and victims, to their position prior to or irrespective of the criminality.⁶⁷ The “treatment” used in these courts is broadly described as an alternative to traditional forms of punishment, as it seeks to divert low level offenders from incarceration. In the new specialty courts, the treatment approach uses coercive sanctions, including incarceration.⁶⁸ The use of coercion, especially the threat of imprisonment, militates in favor of a strong defense attorney presence both in the design and operation of specialty courts.⁶⁹

B. *The Practical Realities: How Treatment Courts Work*

Exactly how do the new specialty courts work and what are they designed to do? These courts bring together new theories of justice, along with modifications in the structure and process of cases.⁷⁰ In most of these courts, the normal adjudicative process is modified to allow an alternative which combines treatment with sanctions or other conditions designed to modify behavior or punish the alleged offender.⁷¹ When a defendant is deemed eligible for a particular specialty court program or treatment alternative, the defendant’s case is placed on the specialty calendar, which theoretically allows the defendant to interact with one particular judge trained in the issues related to certain social problems.⁷² These programs are then designed to have social workers, case managers, and other relevant professionals interact with the defendant in order to assess any treatment issues that may be present. The defendant is then court-ordered into an “appropriate” treatment modality or behavior modification program which may last from several months to more than a year.⁷³ In a growing number of jurisdictions, the treatment is available

67. McCoy, *supra* note 5, at 1524. Judge Hoffman argues against the notion of restoration of position. See Hoffman, *Therapeutic Jurisprudence*, *supra* note 7, at 2068.

68. See Thompson, *supra* note 16, at 341-42. Other forms of “treatment” include restitution, mediation, community service, etc. *Id.*

69. Coercive pressure in the specialty court context often includes coercion in decision making. For example, the defendant often faces a choice between the prospect of jail time or immediate release from jail if he or she decides to immediately go into treatment. The defendant also faces a dilemma in deciding whether to accept sanctions by the court or to challenge alleged violations, whether to accept the advice of attorney, and other similar decisions.

70. Nolan, *supra* note 57, at 1543.

71. Nolan, *supra* note 57, at 1542-43 (introducing concept of “problem-solving” courts).

72. See Peggy Fulton Hora & William G. Schma, *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, 476-78 (1999); Quinn, *supra* note 22, at 43-46. Substance abuse is the most notable social issue in which judges receive training.

73. Many arguments can be made as to whether the treatment ordered by these courts is appropriate for a particular defendant. Advocates of specialty courts, especially drug courts, insist that an assessment by case managers, drug treatment counselors, and/or social workers is made before a court orders a defendant into a particular course of treatment. Thus, they argue that the treatment is specially designed to address the particular defendant’s treatment or other life issues, and therefore, the defendant can succeed in the treatment modality. See McCoy, *supra* note 5, at 1515. This “individual treatment plan” draws from medical and

to the defendant only after a guilty plea is entered or many pre-trial due process rights are waived.⁷⁴ This “post-adjudication” model is very attractive to prosecutors because the case is disposed of even though the defendant is receiving treatment.⁷⁵ Post-adjudication specialty courts have been criticized as contradicting the notion of treatment because they coerce the defendant to accept treatment and recognize addiction in order to avoid jail time.⁷⁶

In a small number of jurisdictions, treatment programs or entrance into a specialized court is available as a condition of pre-trial release without any need for waiving important rights. Advocates contend that this is a better model for the specialty courts because the defendant’s participation is voluntary.⁷⁷ There may, however, be consequences for those defendants who refuse the treatment alternative, or who accept it and later subsequently fail to meet any or all of its conditions.⁷⁸

Although there are many types of specialized courts designed to focus on several different issues, there are several fundamental principles that

scientific principles that are found to combat drug addiction with constant monitoring and encouragement. *See id.*; *see also* Boldt, *supra* note 14, at 1224-25. However, the pro-specialty courts’ lobby ignores the practical realities of what treatment is available to defendants in these courts. Court systems or court agencies often contract with a limited number of treatment providers who provide a limited number of treatment options. This limited array of treatment options fails to address the individual needs of the many defendants who come through the door of the drug court. *See id.* at 1227-28. For example, specialty courts may not have contracted with treatment providers who offer “dual-diagnosis” treatment which is appropriate for those defendants who may have mental health issues in addition to substance abuse problems.

74. *See* Nolan, *supra* note 57, at 1559 (discussing waived rights include right to speedy trial, jury trial, and preliminary hearing). Also, to enter the treatment court, a defendant will have to forego certain defenses that may establish reasonable doubt. *Id.*

75. In the “post-adjudication” model, a defendant must initially enter a plea of guilty to the charged offenses or to a bargained for plea agreement in order to be eligible for the treatment program. Sentencing is postponed until the defendant completes treatment. If the defendant succeeds in treatment then she is guaranteed probation. If she is not successful in treatment, the defendant is sentenced in the normal manner. The post-adjudication model is somewhat favored by the prosecution as it permits them to close cases without regard to success or failure of treatment. In a pre-adjudication model, the defendant is allowed to enter treatment prior to any substantive disposition of the case. If the defendant is unsuccessful in treatment, the case returns to a pretrial stance, and the defendant can elect to go forward with a trial or challenge the constitutionality of police action. Prosecutors argue that it is a burden to their office to delay a case for an entire treatment period and then return to a trial posture. They cite many problems such as regaining contact with witnesses, reconstructing the case, and scheduling police officer time.

76. JIM NEUHARD & SCOTT WALLACE, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS (Jan. 1, 2002), *available at* http://www.nlada.org/DMS/Documents/1019501190.93/document_info (pointing to Tenet 5 that expressly disfavors the post adjudication model). The tenet states that “the accused individual shall not be required to plead guilty in order to enter a problem solving court.” *Id.* The primary reason is a guilty plea has no therapeutic value, but an argument can be made that a guilty plea requirement is a condition imposed by prosecutors acting in adversarial manner. For example, prosecutors may be protecting their position in the case rather than as a collaborator that has disavowed adversarialism. *See infra* Part III, at Section B.1.

77. Hora & Schma, *supra* note 72, at 521 (highlighting defendant’s participation in drug treatment court as voluntary in every jurisdiction).

78. *See* Nolan, *supra* note 57, at 1560 (recounting statements of judges who push defendants into treatment court by veiled threat of jail time).

characterize most of these courts.⁷⁹ In each of the fundamental principles incorporated in the specialty court, the potential for coercion, loss of liberty, or loss of protected rights is possible, and therefore this demonstrates the need for a zealous defender.

The treatment that is mandated for a particular offender is imposed early in the life of a case. Many advocates of specialty courts, particularly drug courts, including government and court officials, theorize that the time period shortly after an arrest of a defendant is the opportune time to intervene with treatment.⁸⁰ They argue that immediate treatment capitalizes on the crisis that has just occurred in the defendant's life.⁸¹ They ignore the coercive effect of treatment at such a time in the defendant's life. This coercion is great because, in addition to the trauma of arrest and specter of jail time, the defendant must make an immediate decision at a time when he or she is in the throes of an addiction or facing other trauma. The reality, as in our fictional scenario, is that the defendant is placed in the untenable position of choosing between treatment, protection of the right to challenge the charges faced, and the expectation of zealous legal representation.⁸²

In order to coerce compliance with the ordered course of treatment, the specialty court judge assesses and enforces a set of increasingly severe punitive sanctions, including jail time and community service, restitution and/or the abdication of rights or privileges.⁸³ These punitive sanctions are usually not negotiated by the defense prior to entrance or placement into the specialty court treatment program.⁸⁴ Indeed, an important principle of specialty courts is that, prior to any violation of a court mandate or sometimes prior to treatment, the defendant must agree that he or she will submit to the particular set of punitive sanctions. Often, the sanction is imposed automatically, without any opportunity for challenge by the defender.⁸⁵ Some defenders believe it futile to

79. See *supra* Section C. (discussing different variations of specialty courts). Specialty courts address a variety of issues, such as domestic violence, weapons offenses, and mentally ill defendants.

80. DEFINING DRUG COURTS, *supra* note 21 (outlining third Key Component of drug courts).

81. DEFINING DRUG COURTS, *supra* note 21. Characteristics of the crisis include the stigma of being arrested, the requirement of attending court hearings on a regular and ongoing basis, the realization that jail time may be mandated, or the realization that the substance abuse or other problem is real and a change needs to be made.

82. See *supra* notes 12, 13 and accompanying text.

83. Boldt, *supra* note 14, at 1216; Nolan, *supra* note 57, at 1555. Some judges seek to lessen the impact of this coercion by using different terminology. Sanctions are seen as "providing help," "restructuring the defendant's lifestyle," "smart punishment," "motivational jail," or a "response." *Id.* at 1556-57. But a mere change in terminology does not take away from the nature of the measure as punitive and coercive. Professor Nolan notes that this "relabeling" does not make the effect any less punitive. *Id.* at 1556.

84. The sanctions are often established during the design and planning phase of the specialty court. They may be predetermined by the judge and treatment officials, who may seek the input of the prosecutor and institutional defender. The treatment court judge, however, may incorporate sanctions that have not been predetermined or approved by the design and implementation committees.

85. Washington, D.C.'s drug court does allow for limited challenge by a stand-in defense counsel. When an alleged violation occurs, the court orders the defendant to appear before the judge at the next available court

try to challenge the sanction. These defenders may not challenge the basis for the sanction, the imposition of the sanction, or the severity of it. Some may not even offer any mitigating evidence or argument to the judge on their client's behalf.⁸⁶

Apart from the sanctions acknowledged by specialty court advocates, judges occasionally use public shaming techniques⁸⁷ to motivate defendants to comply with requirements of the specialty court program. There is frequent interaction between the judge and the defendant in specialty courts, since hearings are scheduled so the judge may determine the effectiveness of the defendant's treatment or the extent of compliance with the imposed conditions. The judge often inquires of the defendant in open court about particular aspects of the defendant's life and compliance with treatment, including asking questions that, if truthfully answered, may inculpate the defendant in criminal activity. In other circumstances, the judge may make statements to the defendant which tend to shame, coerce, chastise, or belittle the defendant for a certain behavior. At times the judge will publicly chastise the defendant, in very harsh tones, for his or her failure to move through the treatment process or to follow through with other aspects of the program. The defense attorney is expected to stand idly by while this interaction takes place.⁸⁸ Thus, public shaming presents another point in the specialty court process where the defense lawyer should be allowed to intervene on the defendant's behalf.

Specialty court advocates argue that the imposition of automatic sanctions is counterbalanced by a set of rewards that are essential to behavior modification and acceptance of treatment.⁸⁹ However, while sanctions in these specialty

date. A stand-in attorney meets the client for the first time and determines if the client wishes to challenge the basis for the sanction. Few challenges are noted to the court. While this system of stand-in counsel is not ideal, it arose as a result of the drug court judges proceeding with sanctioning defendants for alleged violations without any counsel present. See *supra* Part II.D (discussing Washington's drug court).

86. Such inaction by defense counsel arguably violates ethical rules. Almost every state's ethics rules require zealous representation by the attorney. When the defender stands idly by and allows the judge to sanction the defendant, this inaction does not constitute zealous representation. See MODEL RULES OF PROF'L CONDUCT R. 1.1.

87. Reintegrative and stigmatized shaming are major precepts of the restorative justice movement. Carren S. Oler, *Unacknowledged Shame, Unresolved Family Cases*, 38 MD. B.J. 12, 14-16 (2005); see also Anne-Marie McAlinden, *The Use of "Shame" With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 373, 376 (2005). The former is said to condemn the act and not the actor; whereas the latter uses different kinds of stigma and punishment to coerce and motivate actor to prevent recidivism. See generally JOHN BRAITHWAITE, *CRIME SHAME AND REINTEGRATION* (1989).

88. Indeed, interruption by defense counsel often draws the ire of the judge, and often the judge will change the focus of the interaction with the defendant to an accusatory diatribe that endangers the continued liberty of the defendant.

89. Hoffman, *Therapeutic Jurisprudence*, *supra* note 7, at 2063. According to the disease model of treatment used in specialty courts and therapeutic justice movements, these rewards create a sense of achievement and help the defendant to accept their addiction. The disease model finds that the addiction is an uncontrollable, compulsive drug craving that is a "treatable brain disease." Timothy P. Ward, Note, *Needing a Fix: Congress Should Amend the Americans with Disabilities Act of 1990 to Remove a Record of Addiction as a Protected Disability*, 36 RUTGERS L.J. 683, 691-94 (2005); see *supra* note 42. In an article critical of drug

courts are swift and certain, actual or potential rewards for a defendant are less tangible, more long term, and of dubious effectiveness or worth to the client-defendant. Although, the social science experts seem to support the use of rewards in many court systems, financial restraints have prevented their use. Discussion regarding the benefits of rewards is abundant, and may in fact be convincing; however, actual conferring of tangible rewards is rare.⁹⁰ In fact, in some courts, the only reward seems to be that the judge will not get angry with the defendant for any failures in treatment. Sanctions, however, are abundant, and are served up with regularity. There is, therefore, no counterbalance to the sanctions and coercive measures utilized in specialty courts. A strong argument can be made that a reward, if any is given, must be one that is meaningful, empowering and of such a motivating level that it will help change the behavior of the defendant or complement the defendant's treatment in the specialty court.⁹¹

Specialty courts make use of a team approach. The team consists of the judge, the prosecutor, and the defense lawyer, who are all supposed to cast aside their traditional roles and work together to seek completion of the treatment modality for the defendant. Additionally, many of these courts involve non-legal actors, specifically drug treatment professionals, case managers, and social workers, as additional members of the team. In many instances, the non-legal team members have more interaction with the criminal defendant on a weekly or daily basis than the defendant's own lawyer. The defendant meets with these treatment professionals outside of the courtroom according to a proscribed regimen of court-ordered treatment or contact. Often the non-legal team members are able to take certain affirmative actions without the input of the judge, and they can mandate that the defendant engage in certain behavior and meet certain requirements. These mandates are often not subject to challenge by the defendant, and often are not even brought to the defense attorney's attention until some future court date, if ever.⁹²

courts, the author notes that one judge allows participants to "draw from a fish bowl for prizes which may range from nothing . . . up to a TV." Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1498 (2004). I do not believe that conferring rewards is at all times meaningless. However, individual courts and judges need to be careful that the rewards are effective for a particular client-defendant with a particular problem.

90. Intangible rewards, such as praise by a judge or a graduation ceremony, have benefit and can have a powerful effect on a defendant's life, either through the fostering of self-esteem, motivation, and dignity, or through reinforcement of treatment goals and programming. Claire McCaskill, *Combat Drug Court: An Innovative Approach to Dealing with Drug Abusing First Time Offenders*, 66 UMKC L. REV. 493, 498 (1998).

91. There is a wealth of social science literature on the therapeutic benefits of rewards in the treatment context. See generally Miller, *supra* note 89; *supra* note 86.

92. Some examples of requirements imposed by non-legal team members, most often case managers, include imposing a curfew, forcing the defendant to keep certain job interviews, requiring the defendant to enroll in school programs, scheduling meetings with case manager or others, disclosing certain personal information to other service providers or the police, making unexpected and unannounced home visits, and imposing restrictions on freedom of association and travel.

While the team approach is considered a central tenet of specialty courts, the enhanced and increased role of the judge is also very important to the operation of the program.⁹³ The usual model of a specialty court is to have a dedicated judge who presides over all of the cases assigned to the specialty court calendar. The theory is that the judge will develop special expertise on social issues and treatment approaches by repeatedly presiding over these types of cases.⁹⁴ In some treatment courts around the country, the specialty court judge has been in the same assignment for several years. In others, the judges may rotate through the specialty court, just like any other court assignment, staying for as long as one year or as short as a few months.⁹⁵ The role of the judge in specialty courts is distinctly different than in traditional courts, where the lawyers take on a more central role, thereby dictating the course of the litigation.⁹⁶ Of course, in a traditional setting, the defense attorney's role is as a representative of the defendant, and the attorney's actions must conform to the defendant's wishes and best interests.

The centrality of the judge's role in the specialty court is further evidenced by the scheduling of frequent hearings to ascertain the defendant's compliance with the court-ordered treatment. These hearings are often unnecessary from a criminal justice perspective, as they are scheduled when no issues exist requiring judicial intervention. Rather, they are often scheduled solely to give the defendant face time with the judge, who is perceived to be the leader of the treatment team. The theory is that regular interactions between the judge and the defendant increase the likelihood that a defendant will continue treatment, succeed in treatment, and not recidivate.⁹⁷ Treatment court advocates further argue that the regular intervention of an authority figure in the defendant's life will "signal that someone cares and is closely watching."⁹⁸

Finally and perhaps most significantly, the new treatment courts explicitly disavow adversarialism. In the specialty court, the team approach dictates that

93. McCoy, *supra* note 5, at 1529. Indeed, some of the most vocal supporters of drug courts today include jurists who preside over these courts. DEFINING DRUG COURTS, *supra* note 21 (pointing to Key Component 6 of drug courts). See generally Hora & Schma, *supra* note 72; Kaye, *supra* note 54; NAT'L ASS'N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S TAUBER (Nov. 1997), available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc>.

94. Davis, *supra* note 5, at 32; DEFINING DRUG COURTS, *supra* note 21 (highlighting Key Component 7 of drug courts).

95. In the Washington, D.C. trial court, judges are assigned to particular divisions of the court for three year periods. Within the three year rotations, they are assigned to different calendars each year, including the specialty court calendars. See *infra* Part II.D.

96. See *supra* note 25 and accompanying text (describing prominence of traditional defense attorney).

97. DEFINING DRUG COURTS, *supra* note 21 (outlining Key Component 7 of drug courts).

98. See DEFINING DRUG COURTS, *supra* note 21. This justification, however, tends toward an overtly paternalistic model, which may serve to demoralize client-defendants and rob them of the ability to develop appropriate self-coping and self-reliance mechanisms that will allow them to resist the negative behaviors, such as substance abuse.

each side's goal is the defendant's success in the proscribed treatment program. Even in instances where the treatment is something more than substance abuse treatment, such as group counseling, punitive community service, or monetary restitution, the defense is required to support the completion of the "treatment." Judges frown upon any challenge or argument against the "treatment" or a modification to specifically support the defendant's particular circumstances. In some instances, a challenge to any aspect of the treatment can be seen as a material breach of the specialty court contract, thereby subjecting the defendant to sanctions or removal from the program.

C. *Specialized Court Variations and Models*

In the wake of the reported success and widespread acceptance of the drug court model, many other specialized courts have emerged. While the drug court model emerged earliest and fully embodies aspects of therapeutic justice, other models have emerged which utilize some of the same principles, particularly the team-oriented, multi-disciplinary, and non-adversarial approach.⁹⁹ These other models often encompass issues which cannot, and should not, fully embrace the use of treatment as a central tenet. Professor Candace McCoy reviewed the burgeoning literature on drug courts and therapeutic justice and found that the drug court model was applied to other therapeutic justice models, which primarily encompassed restorative justice principles and covered other social problems such as domestic violence or mental illness.¹⁰⁰ McCoy cautioned against equating these types of courts with drug courts, because the issues and methodologies are different.¹⁰¹ She found that each different specialty court must be analyzed on its own terms.¹⁰² Professor McCoy also notes that the emergence of greater numbers of these other specialized courts may mean that judges will increasingly delve into defendants' lives in ways that are inappropriate under the therapeutic approach.¹⁰³ She also notes that judges may not be properly trained to provide the appropriate therapeutic response.¹⁰⁴ While Professor McCoy did not evaluate any of these issues from the perspective of the appropriate role for the defense lawyer in the specialty court, her analysis supports the contention that the growth and expansion of the specialized court model has an inverse relationship to the effectiveness, competence, and zeal of criminal defenders in these courts. In other words, as the numbers and breadth of subject matter of

99. See Nolan, *supra* note 57, at 1543.

100. See McCoy, *supra* note 5, at 1524-25.

101. See McCoy, *supra* note 5, at 1513 n.11.

102. See McCoy, *supra* note 5, at 1513 n.11. While I agree with Professor McCoy that these courts present many different issues and should be analyzed individually, several characteristics which are the subject of this article, including the role of the defense lawyer, have many of the same implications.

103. See McCoy, *supra* note 5, at 1533.

104. See McCoy, *supra* note 5, at 1533-34.

these courts continues to grow, there may be a decline in the role of the traditional adversarial defense attorney.

1. Domestic Violence Courts

Domestic violence is an issue that has plagued the criminal courts for many years, but only in recent years has a coordinated effort emerged to address the issue from a different perspective. New domestic violence courts have emerged in many jurisdictions after the reported success of the first domestic violence court in Brooklyn, New York.¹⁰⁵ These specialized courts are sometimes marked by a coordination of matters affecting an intra-family allegation of abuse.¹⁰⁶ For example, when an allegation of abuse is made, the court provides special services to the alleged victim, including assistance in filing and prosecuting a civil protection order, counseling services, and referrals to social services organizations. Additionally, the case is assigned to the domestic violence judge who gains access to and authority over any other legal matters involving the alleged victim and abuser, which can include any pending divorce, custody, or support matters. In theory, the court is “characterized by close monitoring and supervision by a specially trained judge,” much like other specialized courts.¹⁰⁷ The judge often engages the defendant directly during court hearings and “assumes ‘multiple roles including acting as authority, motivator, problem solver, and monitor.’”¹⁰⁸ Some of these courts make use of anti-violence therapy, offering these services either before or after adjudication.¹⁰⁹ It is difficult to think of domestic violence courts as therapeutic, because therapy is such a small part of the process.¹¹⁰ With community service requirements and liberal use of jail time as a sanction, many domestic violence courts emphasize punishment and retribution rather than treatment for the alleged abuser or protection and empowerment of the victim.¹¹¹ Additionally, some domestic violence courts place little emphasis on

105. Nolan, *supra* note 57, at 1544.

106. The term “intrafamily” is used to denote a broad range of matters in which the parties may have a domestic, familial-type relationship. For example, the D.C. Code defines an “intrafamily offense . . . [as one] committed by an offender upon a person: (A) to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence; or (B) with whom the offender maintains or maintained a romantic relationship, not necessarily including a sexual relationship.” D.C. CODE § 16-1001 (2001).

107. See Nolan, *supra* note 57, at 1544.

108. Nolan, *supra* note 57, at 1544 (quoting Carrie J. Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 268 (2002)).

109. Few of these courts offer or require anti-violence therapy, thereby missing an important opportunity to modify or ameliorate other issues in the intra-family unit, or to empower the complainant to seek additional resources when confronted with future domestic situations.

110. See McCoy, *supra* note 5, at 1531. While batterer’s counseling is often a part of these courts, it is proscribed as a condition of probation, not as a treatment modality for the defendant. *Id.*

111. See Davis, *supra* note 5, at 37. Davis reports that the “emphasis on protecting victims makes courts

procedural due process for the defendant, who is often required to go forward in a contested civil protection order proceeding without counsel, while the alleged victim is represented by local prosecutors.¹¹²

2. *Community Courts*

Much literature has been produced regarding the community court model of specialty courts with particular focus on Red Hook Community Justice Center and the Midtown Community Court, both located in New York City.¹¹³ Community courts are designed to exert social control on a target population to benefit the entire community.¹¹⁴ The benefit from the community may take many forms: it decreases a specific type of crime in a particular area, it gets judges involved in local meetings with concerned citizens, it has residents and merchants advise the court of the community's needs and concerns, or it results in defendants performing community service jobs where the crime occurred.¹¹⁵ Community courts most often concentrate on quality of life crimes, because of the "broken windows" theory which argues that unattended and unaddressed disorderly conduct can lead to an increase in the amount and seriousness of criminal behavior.¹¹⁶

As with other specialty courts, many due process concerns have been raised regarding community courts. Homeless people seem to be unfairly targeted and funding for some of these courts is provided by private business interests, who garner influence with the community court officials and judges.¹¹⁷ Moreover, these courts may not address the root causes of the social problems faced by defendants. For example, where homelessness is a major issue in a community plagued by "quality of life" crimes, addressing the lack of affordable housing, or employment becomes paramount in trying to decrease the problems. Unfortunately, a majority of community courts lack any means to fundamentally address social issues.¹¹⁸

3. *Mental Health Courts*

Judge Ginger Lerner-Wren established the first mental health court in Broward County, Florida, in 1997 to focus mental health services and resources

too quick to lock up defendants" and the "strong momentum toward incarceration." *Id.*

112. This is the situation in Washington, D.C.'s Domestic Violence Unit. *See infra* Part II.D.

113. *See* GREG BERMAN & JOHN FEINBLATT, PROBLEM SOLVING COURTS: A BRIEF PRIMER (2001), available at http://www.courtinnovation.org/pdf/prob_solv_courts.pdf.

114. *See* McCoy, *supra* note 5, at 1517 n.10; *see also* Thompson, *supra* note 16, at 66; Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 900-01 (2003).

115. Kundu, *supra* note 15, at 170.

116. Kundu, *supra* note 15, at 172-73.

117. Kundu, *supra* note 15, 176-77.

118. Kundu, *supra* note 15, 179-80.

on defendants whose mental illness was the primary reason for their recidivism.¹¹⁹ With the judge regularly monitoring their progress, defendants who are charged with “quality of life crimes,” which are usually petty misdemeanors, are given access to community mental health treatment as a condition of release or as an attempt to divert them from the criminal justice system.¹²⁰ Sometimes the treatment is conditioned upon a guilty plea to the charged offense or a lesser included offense. As in drug court, the judge remains an integral part of the treatment team, which involves social workers and other professionals, and when a defendant fails to follow through with the treatment, the judge has the power to sanction and incarcerate the defendant where mental health treatment is involuntary.¹²¹ When a defendant undergoes mental health treatment in jail, the treatment is often inappropriate or insufficient. Additionally, the time spent in jail as a sanction for non-compliance often has a negative effect on the mental health of the defendant.¹²²

The practice of requiring mental health treatment as a condition of probation or release from jail is susceptible to several criticisms. Chief among them is the notion that a defendant can be summarily jailed for curtailing mental health treatment or medication. This potential sanction exists irrespective of the possibility that the medication or other treatment may not work and that some medications can cause severe side effects. Defendants and their lawyers are left with a choice among a specific mental health treatment with the court’s provider, no treatment at all, or no meaningful way to challenge the treatment that the court deems appropriate.¹²³

119. See Introduction, www.browarddefender.com/mhealth/volume_i_mental_health.htm#Introduction (last visited Nov. 8, 2006). Other mental health courts are being implemented every year. See Amy Abern, *Lutz is First Health Court Success Story*, SARASOTA HERALD TRIB., Jan. 25, 2006, at § B; John Koopman, *An Alternative to Incarceration Behavioral Health Court Offers Counseling Criminal Defendants with Psychological Problems*, SAN FRANCISCO CHRON., Jan. 23, 2006, at NEWS.

120. See Davis, *supra* note 5, at 33-34 (describing crimes such as trespassing and spitting in the street). This term is misleading, since all crime, particularly the serious violent crime, has a major impact on the perception of quality of life in a community. Unfortunately, very few specialized court programs exist to provide treatment and services to defendants charged with such violent offenses. Moreover, problems exist when the mental health court is used to criminalize homeless persons and people with mental health issues whose offenses are the result primarily of their living conditions.

121. Nolan, *supra* note 57, at 1544.

122. Many advocates and critics alike criticize the notion of using sanctions to coerce mental health treatment for defendants with diagnosed problems. The Board of Directors of the National Mental Health Association has issued a policy statement calling for caution, the influence of state and local mental health associations, and the development of standards to shape the implementation and accountability of Mental Health Courts. See National Mental Health Assoc., *Position Statement: Mental Health Courts* (Nov. 17, 2001), available at www.nmha.org/position/mentalhealthcourts.cfm; see also BUREAU OF JUSTICE ASST., EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOADS: MENTAL HEALTH COURTS IN FT. LAUDERDALE, SEATTLE, SAN BERNARDINO AND ANCHORAGE (Apr. 2000), available at <http://www.ncjrs.gov/bja/mentalhealth/contents.html>.

123. See generally Office of Justice Program, Mental Health Courts Program, <http://www.ojp.usdoj.gov/bja/grant/mentalhealth.html> (last visited Nov. 5, 2006). For more information on mental health courts, the Department of Justice’s Bureau of Justice Assistance has many publications and

4. *Homeless Courts*

The nation's first homeless court appears to have originated in July 1989 in San Diego, California. It was touted as a way of resolving outstanding bench and arrest warrants held by many homeless people in the city's shelters. The defendants were already enrolled in treatment programs in homeless shelters. Their advocates worked out deals between prosecutors and defenders in which the defendants would immediately plead guilty and be sentenced to continue in their programs. Thus, the court was able to clear up many outstanding warrants and cases. Since the first day of homeless court, San Diego have held similar proceedings once a month in a homeless shelter.¹²⁴ Other California jurisdictions have followed this example.¹²⁵

Unfortunately, some of these proceedings are held in an informal atmosphere where there is little, if any, opportunity for a defendant and her lawyer to develop a relationship that facilitates the vindication of the defendant's wishes and/or position in the court. Specifically, the speed and efficiency of the court become paramount, and little time is taken to make sure that defendants understand and agree with the proceedings.

5. *Other Kinds of Specialty Courts*

The landscape of specialized courts seems to continually expand with new subject matters or target populations being reviewed every year.

a. Prisoner Reentry Courts

The more than one-half million individuals returning to the community every year after a period of incarceration often face a plethora of issues affecting their ability to productively live in society. Many of these people remain under supervision by parole or probation authorities and are subject to conditions that restrict their liberty in different ways, ranging from drug testing to curfews to restrictions on association and residence. They often return to the

resources for technical assistance and substantive advice. *See id.*

124. *See Davis, supra* note 5, at 33-34.

125. Alameda County, California, has developed a "homeless/caring court" that holds proceedings in a homeless shelter. *See* Superior Court of California, County of Alameda, Alameda County Creates Special Court Sessions for Homeless (June 17, 2005), *available at* http://www.court.info.ca.gov/programs/collab/documents/homeless_court_press_Release.pdf. The San Diego Homeless Court Program serves individuals who "demonstrate that they are willing to leave homelessness," and any outstanding warrants are dismissed in lieu of volunteering or attending mental health treatment or substance abuse counseling. *See* SAN DIEGO ASSOCIATION OF GOVERNMENTS, SAN DIEGO HOMELESS COURT PROGRAM: A PROCESS AND IMPACT EVALUATION (June 2001), *available at* <http://www.courtinfo.ca.gov/programs/collab/documents/2001SANDAGHomelessCourtEvaluation.pdf>. Los Angeles has also developed a similar program, however, individuals are eligible only if they have pending minor infractions or tickets for such offenses as jaywalking, fare evasion, or sleeping in public. *See* Public Counsel Law Center, Homeless Court Law Clerk at the Los Angeles City Attorney's Office, *available at* <http://www.publiccounsel.org/internships/hclc.pdf>.

community unprepared to secure meaningful employment, take care of responsibilities such as parenting and child support, combat lingering addiction, or resist the lure of criminal activity. Prisoner reentry courts represent an attempt to take the drug court model to a different level. Judges, who previously lost all control over a defendant once sentencing was completed, move into a role of “sentence manager, overseeing the convicted person’s eventual return to the community.”¹²⁶

The Office of Justice Programs (OJP), which as an arm of the Justice Department has funded several reentry court experiments, defines this new court model as a court that manages the return of prisoners to the community using the authority of the court to apply graduated sanctions and positive reinforcement.¹²⁷ The Court is able to bring together resources to assist the individual and encourage positive behavior, specifically, refraining from recidivating. OJP has identified several core elements for these courts which are similar to the foundational principles for drug courts: assessment and treatment planning; regular status hearings to monitor progress; coordination of needed social services, including job training, housing, substance abuse; a system of graduated sanctions and rewards; and collaboration with community groups.¹²⁸

A substantial number of reentry courts have emerged in the past five years as a result of Clinton Administration experimental pilot programs and other initiatives that focus on the broader problem of reentry into the community.¹²⁹ The provision of defender services in these courts is still questionable, especially since court systems rarely have any jurisdiction over the offenders, and therefore the reentry courts may not be under any mandate to provide legal representation for the clients.

b. Other Specialty Courts

Other specialty courts that have emerged in recent years include DUI Treatment Courts, Gambling Courts, Gun Courts and Prostitution or John Courts. These variations exhibit few, if any, characteristics of therapeutic jurisprudence, and are often marked by dedicated resources and focused court attention to address a particular problem.¹³⁰ They are marked by several restorative justice characteristics, as much attention is placed on the notion that the offender must “pay back” the community in proscribed ways, such as

126. Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the “Reentry Court” Concept from a Strengths-based Perspective*, 4 W. CRIMINOLOGY REV. 91, 92 (2003).

127. *Id.*; see also McCoy, *supra* note 5, at 1518 (stating courts lack innovation or therapy, and only improve operations and resources of particular court units).

128. See Maruna & LeBel, *supra* note 126, at 92.

129. Developing sites include locations in California, Colorado, Delaware, Florida, Iowa, Kentucky, New York, Ohio, and West Virginia.

130. See McCoy, *supra* note 5, at 1517 n.10.

community service projects and restitution.

D. Case in Point: Washington, D.C.'s Specialty Criminal Courts

Many jurisdictions have experimented with some form of specialty court. It is helpful to take a closer look at one such jurisdiction, even though it does not represent a model program or one that embodies a structure that has been adopted by a majority of jurisdictions. Washington is instructive because it has adopted and experimented with multiple kinds of specialized courts. Moreover, its specialized courts embody different models and features of defender participation. A review of this local court system may reveal typical or recurring issues that need to be addressed when considering the advancement of specialty courts, or when incorporating some of the precepts of therapeutic and restorative justice into other courts.¹³¹

Washington, D.C. is a city of about 600,000 people covering approximately sixty-nine square miles. Its system for the administration of justice is unique even among other cities with similar population demographics.¹³² Because it is the nation's capital city with a limited system of home rule, its justice system has unique qualities that produce unique issues that have to be addressed.¹³³ The criminal division of the local trial court, Superior Court, is staffed by both federal and local prosecutors and cases are adjudicated by about sixty judges who are appointed by the President of the United States and confirmed by the U.S. Congress.¹³⁴ The Criminal Division handles over 15,000 misdemeanor cases each year and close to 10,000 felony cases.¹³⁵ Some statistics have

131. Little empirical data has been captured with regard to the efficacy or outcomes of the participants in these specialty courts. Such a study is necessary. The information noted in this article is based upon my experience practicing in these courts, interviews with other lawyers and judges who often practice there, information garnered from annual court reports, and newspaper and other articles regarding these courts.

132. The District of Columbia's population in 2000 was 572,059, but it is estimated that it has declined by about three to four percent since that time. Sixty percent of the city's residents are African-American, and approximately thirty-one percent White. As of 1999, the city boasts about 248,338 households with a median income of \$40,127. However, more than twenty percent of D.C. residents live below U.S. poverty guidelines. See U.S. Census Bureau, State & Country Quick Facts, District of Columbia (2005), available at <http://quickfacts.census.gov/qfd/states/11000.html>.

133. The District of Columbia has unique status with respect to its local governance. It is dependent upon congressional approval of many local laws and initiatives and depends upon a federal financial subsidy to operate. This has given Congress the authority to take over several essential city services, such as the prison system, and to impose guidelines and requirements on the local court systems. Yet D.C. residents are denied voting representation in the Congress. D.C. voters elect a delegate to the U.S. House of Representatives who does not have full voting rights. See D.C. CODE §§ 1-201 - 1-207.71 (1973); National Capital Revitalization Act of 1998, D.C. Act 12-355 (Sept. 11, 1998).

134. The local prosecutor's office is the District of Columbia Office of the Attorney General. With regard to criminal cases, it prosecutes petty misdemeanor offenses and juvenile offenders. The United States Attorney for the District of Columbia prosecutes all other criminal offenses, including misdemeanor offenses such as drug crimes, domestic violence, and violent crimes such as robbery, rape, and murder.

135. 2003 D.C. SUPER. CT. ANN. REP. 50, available at <http://www.dccourts.gov/dccourts/docs/AR04forDCC2.pdf>.

shown that Washington has the “highest incarceration rate in the nation and longer prison sentences than any state.”¹³⁶

The District has a bipartite system for the delivery of indigent defense services. The Public Defender Service for the District of Columbia, created in 1971, is the institutional defender agency and by statute can take no more than sixty percent of the indigent cases that are processed in Superior Court.¹³⁷ The remaining cases are handled by hundreds of private attorneys who are paid by the court through a voucher system under the Criminal Justice Act.¹³⁸ Recently, the private defense bar reduced the number of private attorneys handling indigent criminal cases in an attempt to increase the standard of practice. Currently, only 250 attorneys have been certified by the Superior Court as possessing the requisite experience to receive appointments in indigent criminal cases.¹³⁹ These lawyers are also required to participate in continuing legal education training provided by the Public Defender Service or bar associations.¹⁴⁰

For many years, Washington has been aggressive in its attempts to process the multitude of cases that flow through its courthouse doors. Like other urban jurisdictions, Washington faced an explosion of drug related crime in the early to mid 1980s, culminating in its dubious designation as the “murder capital.”¹⁴¹ Stakeholders in the criminal justice system began searching for ways to decrease crime rates and improve court efficiency. Community policing and prosecution developed, as well as the federal takeover of several local criminal justice functions, including corrections.¹⁴² In 1995, Washington’s City Council

136. Vincent Schiraldi, Editorial, *Dealing with the District’s Drug Users*, WASH. POST, Nov. 2, 2002, at A24.

137. See D.C. CODE § 11-2601 (creating Public Defender Service for the District of Columbia).

138. See Criminal Justice Act, D.C. CODE §§ 11-2601 – 11-2609 (furnishing representation to indigents under the DC Criminal Justice Act (CJA Plan)).

139. See Superior Court of the District of Columbia Administrative Order Nos. 02-33 (eff. Jan. 1 2003) & 02-33 (July 17, 2000).

140. In December 2001, the Superior Court Chief Judge convened an Ad Hoc Committee to determine whether a continuing legal education (CLE) requirement should be instituted for private attorneys receiving appointments to indigent criminal cases. Upon the committee’s recommendation, the Chief Judge signed an Administrative Order requiring eight hours of CLE training per year in approved subject areas in order to an attorney to continue to receive appointments by the court. See Superior Court of the District of Columbia Administrative Order No. 02-33 (eff. Jan. 1, 2003).

141. With the burgeoning northeast crack cocaine market, Washington endured a surge in violent crime in the late 1980s and early 1990s. See U.S. BUREAU OF JUSTICE STATISTICS, REPORTED CRIME IN THE UNITED STATES-DISTRICT OF COLUMBIA (1985-1995), available at <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/RunCrimeStatebyState.cfm>. The rise in the rate of murders per capita gained great media attention. See, e.g., Richard L. Berke, *Capital’s Government Denounced By Bennett, Opening Drug Drive*, N.Y. TIMES, Apr. 11, 1989, at § A (stating District of Columbia has highest drug-related murders per capita); Richard Keil, *Surge in Drug Killings Made 1988 Bloodiest Year in D.C. History*, AP ONLINE, Dec. 31, 1989, at Washington News (noting D.C. shared highest per capita murder rate in country); *Last Year was the Bloodiest in D.C. History*, AP ONLINE, Jan. 2, 1989, at Washington News (discussing D.C.’s 371 murders and distinction of highest per capita murder rate).

142. National Capital Revitalization Act of 1998, D.C. CODE § 2-1219.29 (2001). Prisoners now are

passed the Misdemeanor Streamlining Act, which reduced the maximum sentence for most misdemeanor offenses from one year to 180 days.¹⁴³ The major effect of the Act was to significantly reduce the number of charges eligible for a jury trial, thereby increasing the efficiency of the trial court to process cases.¹⁴⁴ At about the same time, the District's indeterminate sentencing scheme was abolished in favor of a determinate sentencing scheme without parole.¹⁴⁵

1. Superior Court Drug Intervention Program

The movement for a drug court in the District began in 1994 when the city was awarded a five year, \$5 million grant from the Department of Justice to operate an experimental drug court. Initially, the drug court operated with three separate dockets; when an appropriate case was brought into the system it was randomly assigned to either the control, sanctions, or treatment calendars.¹⁴⁶ The control docket continued with the normal adjudication procedures in criminal court, whereas the sanctions docket made liberal use of sanctions to coerce abstinence from drugs, which was determined through twice-weekly drug tests. The treatment court offered defendants a variety of options, including long-term inpatient treatment, group therapy, and acupuncture. After about two years, the treatment docket discontinued use of inpatient treatment programs in favor of day treatment programs.¹⁴⁷ As an essential component of

incarcerated in federal and state facilities, in part under a contractual payment system. The city also contracts with private prison corporations, including the Corrections Corporation of America, to house D.C. prisoners. These contractual relationships leave prisoners incarcerated many miles away from the city and their family resources. The city therefore has little, if any, control over treatment, educational or social services that may be provided for the prisoners. Several nonprofit agencies have initiated lawsuits to improve conditions and treatment of these prisoners.

143. Misdemeanor Streamlining Act, D.C. CODE § 16-705(b) (2006)

144. *Id.*

145. Legislation passed in 1997 by Congress changed sentencing practices in the District of Columbia. The National Capital Revitalization and Self Government Improvement Act of 1997 mandated the closure of the District's prison complex in Lorton, Virginia, transferred authority for parole to the federal government, allowed for federal funding of the local court system, established a sentencing commission charged with amending the D.C. Codes Sentencing provisions to ensure "just punishment" with good time calculated in accordance with federal law, and enacted a system of supervised release, instead of parole, following incarceration. *See supra* note 142 and accompanying text; *see also* D.C. Sentencing Commission Sentencing Reforms, http://www.sentencing.dc.gov/acs/cwp/view,a,3,q,589375,acsNav_GID,1664,acsNav,33149,asp (last visited Nov. 8, 2006).

146. Initially, the court admitted only those defendants charged with non-violent drug related felonies. Violent offenses were excluded and continue to be excluded from many drug courts nationwide because of federal regulations that must be complied with in order to be eligible for federal funding. *See* The Omnibus Crime Control and Safe Streets Act, 42 U.S.C. § 3796ii (2000) (prohibiting admission of violent offenders to drug courts receiving funds from the U.S. Department of Justice, Drug Courts Program Office).

147. I suspect that the driving force behind the discontinuation of residential treatment programs was and continues to be cost. For example, residential drug treatment can cost five to seven times more than outpatient treatment. *See* Lisa R. Nakdai, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557, 562 (2001) (detailing costs faced by New York State for severe

the program, officials maintained statistical data to determine both the rate of success of this treatment modality and how this differed from normal adjudication. Eventually, after the initial experimental grant-funded period, the program settled to one calendar with a different judge assigned each year. The program, called the Superior Court Drug Intervention Program (SCDIP), is formally operated by the District's Pretrial Services Agency, which provides case management, treatment services, and compliance reporting for the program. The SCDIP is a pre-adjudication model that only accepts defendants with a demonstrated history of drug abuse who are charged with misdemeanor offenses. Potential eligibility is noted at the first court appearance and a subsequent assessment is conducted if the defendant is amenable to treatment. A defendant is accepted after the prosecution agrees to allow the case to be held in abeyance until the defendant completes a four-phase outpatient treatment process that can take up to one year to complete.

Sanctions are an integral part of the SCDIP drug court, and sanction hearings occur every afternoon. After an outcry by the defense bar denouncing the practice of holding sanction hearings without the defense attorney present, the SCDIP arranged to have one attorney assigned each day from the Public Defender Service (PDS) to appear in court in the afternoon to represent all defendants who are called in for a sanction that day. Usually, the defendant has violated a condition of treatment court, and it often results from a positive drug test. The PDS attorneys have no information about the client prior to the sanctions hearing and often do not have time to meet with the client prior to the hearing. At the sanctions hearing the judge asks the defense if they will contest the alleged violations. This rarely happens; if the defendant says that she wishes to contest the imposition of a sanction, some drug court judges will explain the process and reliability of urinalysis testing to the defendant. After a lengthy explanation by the judge, few, if any, defendants pursue a challenge to the imposition of a sanction. Sanctions are imposed for violation of conditions according to the guidelines of the treatment court. Individual judges sometimes depart from the guidelines for sanctions.

At regular status hearings which are scheduled for those enrolled in SCDIP, judges directly address the defendant. It is not infrequent for a judge to hold these hearings without the presence of a defense attorney. The hearing, however, is never held without a social worker, case manager, or other treatment professional present.

2. *The Domestic Violence Unit*

Washington's Superior Court began its Domestic Violence Court initiative

penalties for drug offenders); Michael L. Prendergast, M. Douglas Anglin & Jean Wellisch, *Treatment for Drug-Abusing Offenders Under Community Supervision*, 59 FED. PROBATION 66, 72 (1995).

in 1996 and incorporated a coordinated approach to the handling of domestic violence cases. Unlike drug court, which is merely a special calendar in the Court's Criminal Division, the Domestic Violence Unit (DV Unit) is a separate section of the court which combines criminal and family division matters in a central office. The DV Unit has a presiding judge and other judges and magistrates assigned to adjudicate domestic violence matters. One judge normally presides over both the criminal and civil matters relating to an abuse allegation in a family matter.¹⁴⁸ A prominent feature of the Domestic Violence Unit is the assistance it provides to victims seeking services or civil protection orders against alleged abusers. Victims are brought to the DV Unit and meet specially trained victims' advocates, who help them file requests for civil protection orders, and are given referrals for child care, shelter, job referrals, medical treatment, or other emergency services. Legal services are often offered to victims through collaboration with local clinical programs.

When a prosecution involving misdemeanor allegations of domestic violence begins, the case is assigned to one of three calendars. Usually, criminal court officials serve a civil protection order summons at the arraignment and immediately implement a temporary order. A hearing on the matter is scheduled on the same date as the status hearing in the criminal case. The attorney assigned in the criminal case is typically not assigned to represent the defendant in the accompanying civil matters.¹⁴⁹ On the day of the hearing, defendants and victims often meet with a DV Unit worker prior to appearing before the judge in the civil protection matter. The worker determines if a voluntary civil protection order can be issued. The victim is often accompanied by a legal clinic volunteer or a prosecutor, while defendants have no legal representative. Defendants lacking legal counsel many times agree to protection orders including provisions which impact their liberty interests. The judge is informed of the consent agreement and makes inquiries of the parties during a hearing where no legal representative for the defendant appears. Additionally, this same judge or a different judge in the same unit will hear the criminal matter and can impose additional conditions of release based upon the conditions of the civil protection order, or involving other family-related matters.

With respect to the processing of the criminal case, the Domestic Violence Court has instituted a deferred sentencing program for those defendants found eligible by the prosecutors. This program is operated very similarly to a normal plea bargaining process. Cases where the defendant has no substantial criminal

148. Bill Miller, *Domestic Violence Gets New Priority in District; Team of Judges, Courthouse Changes Announced*, WASH. POST Nov. 5, 1996, at B3. A domestic violence case can therefore include divorce, paternity and support, criminal issues, and civil protection orders.

149. Some PDS attorneys appear with their clients during these civil hearings; however, private attorneys, appointed under the Criminal Justice Act, frequently do not, as they are not entitled to remuneration for their time or service.

history, and where the victim does not allege significant injury, are deemed eligible by the prosecution for deferred sentencing. To take advantage of this program, the defendant must enter a plea of guilty and agree to a nine-month deferment of sentencing during which the defendant must attend domestic violence counseling, complete community service, and comply with any other conditions imposed by the judge. At the end of the deferment period, the guilty plea is withdrawn if the defendant has completed all the conditions imposed. In cases in which the defendant declines deferred sentencing, he can enter a plea bargain or proceed to trial. Prosecutors often proceed with trial in domestic abuse cases even when the alleged victim declines to testify.¹⁵⁰

3. Prostitution Court

The Superior Court has experimented with an initiative designed to decrease the number of prostitution cases adjudicated in its misdemeanor branch. In 2003, the court set up a prostitution docket to “provide a more coordinated approach to dealing” with these cases, including the prostitutes and customers. This court attempted to refer those arrested for these crimes to drug or mental health treatment.¹⁵¹ However, no special procedures or programs were included in this specialized court, so cases were handled in the ordinary fashion. The only program that routinely accepts defendants, only after the prosecution agrees to allow the defendant to enter the program, is a one-day program that focuses primarily on the public health risks of prostitution. The benefit to the community of the prostitution docket is unclear. Some police officers and prosecutors have noted that the court is now equipped to try the cases more quickly and efficiently.¹⁵²

E. A Paradigm Shift?

How far will the expansion of specialized courts go? While states evaluate and implement new ideas for specialized courts, it remains to be seen whether this expansion will cause a radical and system-wide change in the way that justice is administered and conceived in the nation’s courtrooms.

Recently, some scholars have questioned whether the vast expansion of the specialty courts’ methodology, which relies on therapeutic and restorative

150. See *supra* note 122. Prosecutors often seek to introduce the hearsay spontaneous statements of the victims in lieu of live court testimony by the alleged victim. The recent *Crawford* decision, however, may have serious implications for this practice. See generally *Crawford v. Washington*, 541 U.S. 36 (2004).

151. Henri Cauvin, *City’s Prostitution Court Targets Defendants for Aid*, WASH. POST, May 15, 2003, at B2.

152. The District does not have a formal Mental Health Court. After studying the issue for some time, the court implemented instead a diversion type program called “Options” that is available in all misdemeanor dockets. A client-defendant may enter this voluntary, pre-trial program to receive coordinated services. The judge adjudicating the case may view compliance with the program as an indicator that the court’s sentence should reflect the defendant’s changed circumstances.

justice principles, signals a “paradigm shift” in the administration of justice landscape.¹⁵³ The shift would signal a vast change in the way courts are structured and the way in which actors within the court system, such as judges and lawyers, view and fulfill their duties. Additionally, it would signal a widespread concept of justice by the public that embraces new ideas, theories, and methodologies. Moreover, the change that might occur would become apparent in all aspects of the court system. The new principles and concepts would slowly, but methodically, infect the criminal court system including law enforcement, prosecutors, and criminal defenders. In this regard, the question becomes: has the specialty court movement and its way of doing business changed the criminal justice system’s landscape in a broader sense?

One way to answer this question is to assess the extent to which major judicial groups have embraced the ideals of the specialty court movement. In recent years, several court officials, affinity agencies, and judicial organizations endorsed the specialty courts’ therapeutic and restorative justice language. In a supportive joint resolution, the Conference of Chief Justices and the Conference of State Court Administrators described specialty courts as employing “principles and methods grounded in Therapeutic Jurisprudence, including integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multi-disciplinary involvement, and collaboration with community based, and government organizations.”¹⁵⁴ Through this resolution, the judges and administrators seemed to endorse the notion of extending therapeutic jurisprudence to courtrooms nationwide. Additionally, many individual judges, most often those who played an integral role in setting up specialty courts or who preside over these courts, support the jurisprudence emanating from specialty courts.¹⁵⁵

Like judicial groups, academics suggest that the emergence of specialty courts represents a paradigm shift in our criminal justice system.¹⁵⁶ Others have merely characterized the new specialty courts as an experiment that moves away from the traditional legal paradigm.¹⁵⁷

153. NATIONAL DRUG COURT INSTITUTE, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT 1 (Apr. 2003), available at <http://www.ndci.org/CriticalIssues.pdf>; see Nolan, *supra* note 57, at 1564-65 (calling it “overall transformation of the adjudicative setting according to the therapeutic paradigm”).

154. See Nolan, *supra* note 57, at 1542.

155. See Hora & Schma, *supra* note 77, at 446-48. See generally Kaye, *supra* note 54; NAT’L ASS’N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S TAUBER (Nov. 1997), available at www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc.

156. Professor James Nolan believes that the new courts do represent a paradigm shift in the criminal justice system. See generally JAMES L. NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001).

157. Michael C. Dorf & Charles F. Sabel, *Drug Treatment courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 837 (2000).

On the other hand, some commentators believe it is too early to call the emergence of specialty courts a “paradigm shift.” Professor Candace McCoy notes that many questions still linger as to whether the specialty courts will have the desired effect on problems in the criminal justice system.¹⁵⁸ She notes that it is unclear whether this new system will reduce recidivism, especially since there is currently no statistical data on recidivism that supports the contention. She also questions whether these courts will stand the test of time and reduced federal funding.¹⁵⁹ Many of the drug courts would not have been started but for the presence of substantial federal funding. To receive funding, the court had to be set up a certain way, which included instituting the collaborative team approach and the diminution of the adversary model.¹⁶⁰ A very real danger exists, however, that federal funding will not continue for these courts. The specialty courts will only be able to continue if states and localities step in and provide the funding for them.¹⁶¹

1. An Experiment Gone Too Far?

With the emergence of so many specialty courts, many are left to wonder if this is just a one time explosion with growth into new subject areas. Will the end result be that the overall administration of justice remains the same? For example, a “speedy homicide” court was recently enacted in Milwaukee, Wisconsin. This new court purported to use drug court methodology in the homicide context.¹⁶² The sole purpose of the methodology, though, was to move cases along and prevent delay in the adjudication of these most serious cases. While this is an attempt to solve a “problem” in the criminal justice system, it stretches logic to find any adherence to therapeutic or restorative justice principles, where there are no treatments and no services provided to the defendants.

The expansion of the new problem-solving courts may also cause an erosion of due process in contexts other than those involving a committed, zealous

158. See McCoy, *supra* note 5, at 1532. Therapeutic jurisprudence, restorative justice and the specialty courts that they have engendered are not without their critics. Judge Hoffman argues that this new strain of rehabilitationism is “ineffective and dangerous,” largely because of the “unchecked judicial power” in these courts. See Hoffman, *supra* note 11, at 2078. Judge Bamberger acknowledges the benefits of these courts but recognizes that courts of general jurisdiction will still need to incorporate different sentencing strategies in order to combat some of the same problems that are highlighted in specialty courts. See Phylis Bamberger, *Specialized Courts: Not a Cure at All*, 30 FORDHAM URB. L.J. 1091, 1099-1101 (2003).

159. See McCoy, *supra* note 5, at 1516-17.

160. Many other guidelines were instituted, such as excluding violent offenses or offenders with a particular criminal history.

161. See McCoy, *supra* note 5, at 1531; see also NAT’L ASS’N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S TAUBER (Nov. 1997), available at www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc. However, localities will have to face the high cost of specialty courts.

162. Thomas P. Schneider & Robert C. Davis, *Speedy Trial Homicide Courts*, 9 CRIM. JUST. 24, 26-27 (1994).

defender. Recently, in California, drug court judges lobbied for an extension of their authority so that they could order random searches of the residences of drug court defendants and the defendants themselves. They proposed an amendment to the penal statute that would allow these searches “at any time during the day or night, with or without probable cause”¹⁶³ The judges rationalized that their proposal served therapeutic purposes; that is, with random checks, drug court judges could better monitor the efficacy of the treatment. This includes, among other things, the need for additional treatment, such as getting other family members involved in treatment and parenting classes.¹⁶⁴ Irrespective of the potential danger to our due process ideals, judges believed that through this additional information better therapeutic outcomes might be achieved for the drug court defendants.

One can only hope that the California proposal is an extreme example of the options being considered in the context of extending and expanding the specialty court model. This example illustrates the potential danger of unchecked judicial power, as well as the expansion of other ideals of the drug court methodology.

Only time will tell if the emergence of specialty courts mark a radical, system-wide change in the way criminal courts are administered. These new courts signal a significant movement away from some of the adversary system’s key principles.

2. *A New Criminal Defense Paradigm?*

If the emergence of specialty courts indicates a paradigm shift in the administration of justice, then there is a real potential that the over-emergence of specialty courts signals the beginning of a paradigm shift in the role of the defense attorney in criminal court. That is, the Freedmanian, traditionalist view of the zealous, committed defender who rails against the system may be in decline as a model for defense representation. And, if the model is in decline, the reality often follows.

Certainly, a great number of defense attorneys have no objection to the therapeutic or restorative ideals of these new courts.¹⁶⁵ One of the realities of the treatment court movement is that it sometimes provides alternatives to incarceration even though the alternative may have multiple possibilities that are not readily apparent to the defendant. Some defense attorneys have even championed its principles.

A new criminal defense paradigm which puts a premium on a defender who

163. See Nolan, *supra* note 57, at 1562.

164. See Nolan, *supra* note 57, at 1562.

165. See Quinn, *supra* note 22, at 73-74; NAT’L ASS’N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S. TAUBER, (Nov.-Dec. 1997), available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#pitfalls>.

does not vehemently assert the client's wishes would be an unfortunate byproduct of the positive benefits that specialty courts can bring. And ultimately, a new criminal defense paradigm is an indefensible change in our criminal justice system which may further lead to a decline in the levels of protection afforded to defendants.

PART III: THE GOOD, THE BAD AND THE INEFFECTIVE: DEFENDER ROLES IN THEORY AND PRACTICE

Defenders need to look at this as a new approach that requires a level of team work and partnership that is not often seen. It requires defenders to take a step back, to not intervene actively between the judge and the participant, and allow that relationship to develop and do its work, and basically to understand the importance of working within a team concept. It really does demand that they partner and work very closely with both the court, treatment, and their former adversary, the prosecutor.¹⁶⁶

This comment about the role of defense lawyers in drug courts by Judge Jeffrey Tauber of the National Association of Drug Court Professionals succinctly summarizes the view of specialty court advocates who are strongly in favor of the main precepts of the specialty court movement. It asserts that defense counsel in specialty courts cannot function in their traditional role. In other words, those judges and officials who have designed the specialty courts require that the traditional adversarial role of the criminal defense attorney be subordinated to the notion of teamwork. Unfortunately, this means that the zealotry that is essential to the functioning of the defense attorney, as well as the intervention that is necessary to protect important rights, may be lost in specialty courts. In essence, the very premises of drug courts, and by extension other specialty courts, are at odds with standard notions of zealous advocacy.¹⁶⁷ The notion that the defense attorney in a specialty court must work as a team player engaged in the social rehabilitation of the defendant is antithetical to the traditional role of the criminal defense lawyer and invokes musings of the kindler, gentler defense practice advocated by Professor Simon.¹⁶⁸ In fact, some advocates argue that these new specialty courts "empower a new type of prosecutor and defense counsel," one that will press all of his or her energies toward serving the best interests of the defendant.¹⁶⁹ This is at least in so far as those best interests include treatment according to the modalities offered by the

166. NAT'L ASS'N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S. TAUBER (Nov.-Dec. 1997), available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#pitfalls>.

167. Daniel Richman, *Professional Identity: Comment on Simon*, 40 AM. CRIM. L. REV. 1609, 1610 (2001).

168. See Simon, *supra* note 5, at 1601.

169. McCoy, *supra* note 5, at 1524 (citing ABA CJ Section 1996 Monograph on drug courts and due process).

particular specialty court. According to the rhetoric, this new type of defender places a premium on the stated goals of the treatment court rather than on the defendant, and focuses all of his or her energy on that narrow goal.

Thus, the “role” of the defense attorney in specialty courts embodies no vestiges of the adversarial defender, and therefore takes on a “best interests” mantra. When a defendant is found to be in need of treatment by the court, prosecutor, social workers, or case managers, the defense attorney is expected to behave in a way that falls in line with the treatment recommendation and to act in a way that supports and furthers the treatment goals. The expected behaviors and actions of the defense attorney—what can be termed the “role markers”—are thus guided by the dictates of the court, and not the wishes of the defendant. Consequently, the defense attorney is expected to forgo any action or challenge any treatment, the process of adjudication, or interaction between the judge and defendant. This is true even when that interaction treads upon important constitutional rights, such as the right against self-incrimination. The defense attorney stands idly by, as part of the team, while the specialty court process takes effect. The only affirmative conduct expected of the defense attorney is to encourage the defendant to follow through with the treatment and any other requirements of the specialty court modality.¹⁷⁰

Advocates of specialty courts argue that the team-player defense attorney model is superior to other models because of the beneficial results which come from treatment courts. They further state that the apprehension of defense attorneys is “unfounded.” They argue that defense attorneys “should view treatment courts as being in their clients’ best interest” and as “the best method for ‘ending the cycle of drugs and crime.’”¹⁷¹

While the “good” that can come from specialty courts, i.e., getting needed treatment for criminal defendants, is important and necessary, questions still remain as to whether the specialty court model is sufficient to meet ethical and practice standards,¹⁷² and whether the loss of constitutional and other protected rights will deprive the specialty court defendant of procedural justice. Indeed, practicing lawyers and some commentators continue to raise several issues and voice their apprehension about the legal representation that is provided in specialty courts. Their comments continue to raise the specter of diluted due process and procedural justice. Unfortunately, the danger inherent in these concerns is heightened if the emergence of specialty courts has shifted the

170. For example, regardless of the potential for sanctions, defense attorneys are expected to encourage clients to admit violations of court orders because this recognition is considered a therapeutic step in support of treatment. See Hora, *supra* note 77, at 479 (arguing defense attorneys forgo “motions to suppress evidence, which might delay the process or prevent the defendant from accepting responsibility for drug use” or “counseling a defendant to disclose continued drug use in order to foster honesty and reduce the barriers to effective drug treatment”).

171. See Nolan, *supra* note 57, at 1557 n.79 (quoting Hora & Schma, *Therapeutic Jurisprudence*, 82 JUDICATURE 8, 10 (1998)).

172. Hora & Schma, *supra* note 77, at 508-11.

paradigm upon which our criminal justice system operates.

A. *Greater Concerns than Realized at First Review*

In an important article that reinvigorated the debate on representation in drug courts, and by extension other specialized courts, Public Defender Mae Quinn advocated “pulling back on the reigns of the present high speed drug court movement.”¹⁷³ Quinn reviewed one of the seminal articles written on the drug treatment court movement and evaluated several role markers of defense attorneys working in the therapeutic justice model.¹⁷⁴ She noted substantial concerns with each noted area of defense attorney action in specialty courts and argued that such concerns could not be dismissed. Quinn found that greater discussion was needed about the ethical and legal issues surrounding these new role markers for defense attorneys practicing in drug treatment courts.¹⁷⁵ Quinn’s analysis yields more implications when considering whether the concerns regarding defense attorney practice in specialty courts are magnified or enhanced given the widespread acceptance of such a mode of court administrations.

For example, Quinn showed great concern for the notion that in order to enter a specialty treatment court, a defense attorney must counsel her client to waive important constitutional rights without knowing what the final outcome might be for the defendant.¹⁷⁶ Unlike a plea bargain, where the defendant knows what will happen because there has been a negotiated sentence, or where there are clear boundaries that limit a judge’s options in sentencing the client, the defendant and defense attorney in a specialty court scenario do not know the results if the defendant fails treatment.¹⁷⁷ Looking through the results lens, therefore, the advice to the client about whether to enter the treatment court program is meaningless, or at the very least, uninformed.

The magnitude of this issue cannot be measured solely through an analysis of results. In the fictional scenario at the beginning of this article, the defense lawyer is in the same position: counseling a client to enter a specialized court program without having any idea as to the potential results for the client. The lawyer, however, is also counseling the client on this important decision without having adequate information about the client, the case, or the extent of the defendant’s so-called problem. In this post-adjudication specialty court scenario, the attorney is incapable of fully explaining the rights that are waived

173. Quinn, *supra* note 22, at 74.

174. Hora & Schma, *supra* note 77, at 38.

175. Quinn, *supra* note 22, at 73-74.

176. Hora & Schma, *supra* note 77, at 38.

177. While jurisdictional differences exist in plea bargaining practices, in almost all situations when a defendant elects to waive his or her rights to trial and to remain silent, he or she knows what sentence will be handed down, or knows the range that the sentence might entail. This range results in a bargained for outcome, which is usually lower than the time that the defendant faces if she elects to proceed to trial.

when a defendant enters the specialty court.¹⁷⁸ From the interaction between this client and his attorney, it is clear the trepidation upon which the decision to enter a treatment court rests. Many of a defendant's basic questions do not get answered because the decision to enter the treatment court must be made very quickly, often on the day of the first appearance in court or very shortly thereafter. At other times, the questions do not get answered because the attorney has developed a mode of practice in the specialty court that does not lend itself to further attorney-client interaction.

Some commentators theorize that the answer to this quandary is to allow for additional time before the defendant makes a decision to accept or deny the specialty court program.¹⁷⁹ Even allowing the additional time that some commentators believe sufficient—up to a couple of weeks—within which to make the decision, does not cure all the problems inherent in this scenario.¹⁸⁰ Looking at the need for more time, one to two weeks additional is just not enough time to: allow the attorney to make informed decisions about the strength of the case through investigating the facts, obtaining discovery, and filing motions; foster a strong relationship between attorney and client that rests upon a sense of trust; or permit the attorney to find out information about the client's background to determine the appropriateness of treatment. Undoubtedly, specialty court advocates, including judges and prosecutors, would balk at expanding the time even more, since immediate treatment is one of the main foundational principles behind therapeutic justice.¹⁸¹

Consequently, the defense attorney either has to leave the decision entirely to the client or counsel the client without any basis, as in our scenario.¹⁸² Both courses of action create serious implications for the attorney-client relationship. The transactional trust that underlies the traditional adversarial defense attorney-client relationship may never develop, or where there was at least some predisposition by the defendant to trust the defense attorney by virtue of her position, it may be lost. The trust is replaced by a kind of indifference when a client enters a specialty court. The attorney may not ascertain the extent of the rights the defendant forfeits or may neglect to fully explain them

178. See *supra* notes 119-121 and accompanying text (discussing pre- versus post-adjudication specialty courts).

179. See JIM NEUHARD & SCOTT WALLACE, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS (Jan. 1, 2002), available at http://www.nlada.org/DMS/Documents/1019501190.93/document_info. See generally BERMAN & FEINBLATT, *supra* note 113.

180. See Berman & Feinblatt, *supra* note 113, at 12. Some specialty courts that are in operation, such as those in Seattle and Portland, give “defendants several weeks to test out treatment while their cases are still pending.” *Id.* The client-defendants are then in a position to make an informed decision regarding the waiver of important rights after full consultation with and review of the case by their attorney. The defense attorney is able to investigate the case, evaluate the merits of any potential evidentiary challenges, and engage in some discovery before advising the client on entering the specialty court.

181. See *supra* note 69 and accompanying text.

182. See *supra* notes 4-11 and accompanying text.

to the defendant either out of a belief that it is not needed given the treatment focus of the specialty court, or that other professionals who are looking out for the defendant's best interests, such as case managers, will explain this and other important aspects to the defendant. Such a course is neither competent nor effective, and may violate ethical rules and render the assistance of counsel ineffective.¹⁸³

This very real danger cannot be explained away as an isolated example of the "shoddy practice effect," namely that negligent defense attorney practice is not endemic to the specialty court, but rather, is a response to specific poorly structured courts that can be cured by the use of best practices.¹⁸⁴ Several of Washington, D.C.'s specialty courts are concerned with the institution of best practices, although examples of such issues can be seen regularly in its Drug Court. For example, the Drug Court sets aside one to two days each week for new defendants to enter the program. On these days, the judge addresses all program entrants only after the court's case managers have found them to be eligible and the entrants have signed the appropriate waiver forms. Case managers ensure the entrant's eligibility to obtain waivers while interviewing the entrant outside the courtroom. However, no designated time exists for the court to call cases and because the court will often call cases without the defense attorney being present, the defense attorneys often do not attend the interview or court hearing.¹⁸⁵ During the interview, the defendant is asked to sign legal documents which may have constitutional implications, and is asked about the extent of their drug use.¹⁸⁶ Truthful answers to such questions may

183. *Strickland v. Washington*, 466 U.S. 668 (1984), sets the baseline standard for effective representation by defense counsel in criminal cases. Rule 1.4 of the Model Rules of Professional Conduct requires that a lawyer explain court matters to a client in order to permit the client to make informed decisions about their case and to consult with the client about the objects of the representation. This would include consultation about the merits of the case and the need and desire for treatment.

184. Many specialty court advocates also point to the notion that best practices in these courts will be developed as a result of experiential learning, as more data and experience are gathered with these courts; then issues can be addressed by instituting new practices. This response is troubling because it lends credence to the position that specialty courts are an experiment in which human subjects' life and liberty depend upon untested, theoretical methods. Simon, *supra* note 5, at 1596; *see also* Spinak, *supra* note 51, 1620-21. As an additional matter, the crisis in indigent defense has been documented in many articles and a growing number of cases challenging the ability of defender systems to provide competent and adequate representation given excessive caseloads, nonexistent defender quality controls, and inadequate funding and remuneration for defenders. Bruce Green calls it a "national epidemic of neglect," that carries with it a real danger that economic disincentives exist resulting in indigent representation falling short of ethical and practice standards. *See* Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1184 (2003); *see also* LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 35 (1995); THE SOUTHERN CENTER FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER . . .": A REPORT ON GEORGIA'S INDIGENT DEFENSE SYSTEM (Jan. 2003), available at <http://www.schr.org/reports/docs/jan.%202003.%20report.pdf>.

185. *See* Quinn, *supra* note 22, at 64-67 (criticizing Bronx Treatment Court's practice of going forward with status hearings without defense counsel's presence).

186. Among the constitutional rights that may be implicated include the right to a speedy trial and a jury,

implicate Fifth Amendment protections against compelled self-incrimination. Such action may violate ethical rules because the attorney is not counseling the client as to a critical decision in the case. The decision is akin to determining whether to accept a guilty plea, to waive a trial by jury, or to testify; decisions, which under the rules, are exclusively left to the defendant.¹⁸⁷ It is one of the most important decisions a defendant can make in a criminal case and should be undertaken only upon full advice and consultation with counsel.

By allowing this practice to continue, and by silently approving unethical behavior by defense attorneys, judges, prosecutors, and court officials in Washington D.C.'s Drug Court and other specialty courts in that jurisdiction and around the country, we may be unwittingly approving a standard of practice that is unacceptable and which may set the standard for ineffective and unethical practice.¹⁸⁸

Quinn also notes concern with the notion of collaboration and the team-player model in treatment courts.¹⁸⁹ Specialty court advocates equate the role of the defense attorney in specialty courts with that of the judge, prosecutor, and drug treatment professional. The defense lawyers, however, have no real power in the process. The defense lawyer does not make charging decisions, has no power to dismiss an unjust charge, and has no power to dismiss a charge after successful completion of treatment. The prosecutors retain these decisions and have a large role in system-wide decisions. These are decisions retained by the prosecutor, who has a greater role in decisions in the treatment court on a macro, or system-wide, and micro, or individual case, level.

One of the biggest decisions in the design and initial implementation of a specialty court is whether the court will employ a pre- or post-adjudication model.¹⁹⁰ Prosecutors have been particularly powerful in their ability to "persuade" judges and court officials that the new specialty court should only allow treatment after a defendant has entered a guilty plea. The prosecutors often argue that their ability to go forward on a case when a defendant fails in treatment after many months is compromised without a guilty plea. Their persuasion in this design process often amounts to a veto. Since the prosecutor has charging authority and is an independent branch of government, the court cannot force the prosecutor to allow a case to be dismissed, diverted, or held in abeyance until treatment or restitution is completed.

which a client may waive by agreeing to enter the treatment court program.

187. See MODEL RULES OF PROF'L CONDUCT 1.2(a) & Cmts.

188. See VIRGINIA INDIGENT DEFENSE COMMISSION, 2005 ANNUAL REPORT EXECUTIVE SUMMARY, available at

<http://www.indigentdefense.virginia.gov/VaIDC%202005%20Annual%20Report%20Executive%20Summary.pdf>; INDIGENT DEFENSE REPORTS, REPORT OF CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART 1, available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc>; see also Green, *supra* note 184, at 1178-85.

189. Quinn, *supra* note 22, at 56.

190. See *supra* note 75 and accompanying text.

The veto power by the prosecution is just one example of the fallacy of the team-player mantra in specialty courts. The notion of a team, at least in this example, is one in which all players have an equally important role, voice, and input into the pursuit of a particular goal. This is not the case for the defender in the specialty court; the defender has no veto power during the design phase or thereafter.¹⁹¹

Even in those instances where an institutional defender is present at the design and implementation table, the concerns, suggestions, and questions that are brought forth may be weighed down against the momentum that drives the establishment of the specialty court. In other words, the driving forces behind these courts, or their initial laudable or other goals, sometimes do not include defenders and defender organizations in the coalitions of stakeholder groups that have substantial input in the design, formulation, and initial implementation of specialty courts.¹⁹² Perhaps this phenomenon is a recognition by some judges, prosecutors, and other court officials of the very nature of the defense function in the criminal justice system, which is to defend and advocate on behalf of the individual and champion the accused's traditional rights. Under the traditional adversarial model, defending and advocating takes the form of resistance to government-imposed restrictions on liberty, way of life, or any part of self-determination. Some tension might appear when a defender is asked to take part in designing a system that institutionalizes automatic sanctions for defendants who violate conditions of treatment and does not allow defendants to challenge the sanctions or the parameters of the treatment. The extent to which the defenders' powerlessness leads to feelings of inadequacy of purpose and role is an interesting and compelling issue that specialty court advocates should study.¹⁹³

Additionally, Quinn is concerned about the possibility that prosecutors will

191. Professor Spinak notes that defenders often feel as though their role in the creation and execution of specialty courts is unequal to other stakeholders in the system because they do not have the financial control that judges and prosecutors have, are less likely to speak with one voice concerning the specialty court, are skeptical that a cultural transformation is taking place in the way their clients' social issues are viewed, and are apprehensive that the specialty court will devolve into a more unjust system for their clients. See Spinak, *supra* note 51, at 1618-20.

192. See JIM NEUHARD & SCOTT WALLACE, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS intro.(Jan. 1, 2002), available at http://www.nlada.org/DMS/Documents/1019501190.93/document_info. It appears, however, that some institutional defender organizations have influenced the design of drug treatment courts. See NAT'L ASS'N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S. TAUBER (Nov.-Dec. 1997), available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#pitfalls>. The same cannot be said for other types of specialty courts. See *infra* Part II.C.

193. Some Scholars have written about the various issues that might lead to defender burnout and disillusionment. See *supra* notes 4-11 and accompanying text; Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1211 (2005). See generally MCINTYRE, *supra* note 184; PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM (2005).

“dump” non-meritorious cases into treatment courts.¹⁹⁴ That is, cases that would not survive the normal adversarial process, like those vulnerable to a dismissal or motion to suppress, would be charged because in all likelihood the defendant would accept entry into the specialty court. Quinn argues that defense lawyers have little or no power to ensure that case dumping does not occur in jurisdictions using specialty courts.¹⁹⁵

The case dumping issue that Quinn describes has further ramifications. Even before a prosecutor charges a non-meritorious case, the police may arrest an inordinate number of defendants simply because the specialty court exists. In other words, police discretion may send many defendants into the court adjudication process who normally may be diverted to other systems or not be arrested at all. For example, defendants who exhibit mental health issues when confronted by police officers may more likely be arrested and jailed, on the theory that they will end up in mental health court, than be sent to a locality’s mental health system with its overwhelming delay and red tape that officers might have to endure.¹⁹⁶

Judge Hoffman calls this phenomenon the “popcorn effect,” whereby the existence of the specialty courts, specifically drug courts, cause “police to make arrests in” the types of cases that they would normally “not have bothered with.”¹⁹⁷ Hoffman focuses on how the increased number of cases funneled through drug courts strains court staff and the docket, and theorizes that this strain on resources leads to “demoralized and ineffective drug courts.”¹⁹⁸ Hoffman does not, however, address the issues raised by this problem for the delivery of defense services and the quality of defense representation.

Institutional defender services organizations have been inundated by an increase in the number of cases, particularly those with little to no merit. Caseloads will undoubtedly increase for institutional defender organizations and for individual attorneys who represent defendants through a court appointed voucher system. Institutional defender organizations should be given additional resources to deal with the increased volume of cases, and court appointed systems should be restructured to allow for higher per-hour payments or additional lawyers to represent the increased number of defendants. Lawyers struggling to deal with the increased caseload may skimp on the quality of representation that they are able to provide.¹⁹⁹

194. See Quinn, *supra* note 22, at 58-59.

195. Quinn, *supra* note 22, at 58-59.

196. See National Mental Health Assoc., *Position Statement: Mental Health Courts* (Nov. 17, 2001), available at www.nmha.org/position/mentalhealthcourts.cfm.

197. Morris Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1502-03 (2000). Judge Hoffman notes the major increase in the number of drug case filings after the establishment of the Denver Drug Court.

198. *Id.* at 1504-05.

199. In recent years much has been written about the effects of underfunding defender services and about the potential ethical problems that arise when defenders have overburdened caseloads. See Green, *supra* note 184, at 1180; see also *supra* notes 4-11 and accompanying text.

Mae Quinn notes that defenders may also cross an ethical line by having to “specially prepare” a client for an interview or testing by treatment counselors in order to gain admission into the program. Quinn implies that it is problematic for a defender to counsel a client to omit information that might lead a treatment program to reject a client. I, like many defenders, find no fault with “special” preparation of the client in such a circumstance, as it is similar to other special preparation that is essential to the functioning of the adversary process. Special preparation takes place in the context of plea bargaining and trial witness preparation for either side, as case strategy often requires that emphasis be placed on putting forward the best case possible.

While special preparation causes me no concern, the initial point raised by Judge Hora and others that Quinn finds inapplicable to her practice is compelling.²⁰⁰ In some specialty courts, a defense attorney has the responsibility to prove that a defendant is in treatment, but at the same time, the defender has no power to prove what treatment is needed or to compel that treatment. Many specialized courts have procedures which require the defense attorney to request that a client be admitted to a specialty court according to specific guidelines. These guidelines can be rigid as they focus on a defendant’s prior record, exposure to prior treatment, and need for treatment at the time of arrest or charging. Moreover, these guidelines may be dictated by the treatment services that are available to the specialty court. Some of these programs make defendants ineligible for the specialty court treatment if their problem is not deemed serious enough or if they have additional concurrent social problems, such as mental illness or homelessness. Drug treatment programs are often not equipped to deal with clients who are dually-diagnosed with mental health issues and substance abuse addictions. Without strong defense advocacy, defendants who fall into this category are often automatically rejected from a specialty court program. Strong defense advocacy may entail, among other things, zealous efforts to uncover the extent of the defendant’s problem, challenges to the provision of services within the specialty court, and contesting the guidelines by which the specialty court operates.

Additionally, defense concern with the notion that they have to prove that a client needs treatment is justified by other scenarios. For example, in Washington, D.C.’s drug court defendants, who have only tested positive for drugs on one occasion, may not be eligible for entrance into drug court. The guidelines specify that a defendant demonstrate a history of substance abuse, and the drug treatment professionals associated with this particular drug court do not believe that one positive test provides an adequate indication of addiction. The defense lawyer may then find herself in a paradox: either counsel her client to continue the use of drugs again so that the client can test

200. See Quinn, *supra* note 22, at 60-61.

positive on a subsequent drug test and gain admission to the specialty court, or counsel the client to follow the law and conditions set by the judge and forego the treatment that the client might need and want. Even under the “best interests” mantra of specialty court jurisprudence, this situation presents problems for a defender and is inconsistent with the stated goals of the specialty court movement.²⁰¹

While this scenario presents a catch-22, it is not fictional. It is a real life situation that illustrates that the theory and rhetoric of specialty court advocates is often inconsistent with reality, especially as it pertains to the role of the defense attorney.

Quinn further points to the quandary in which well-meaning defenders may be placed, such as having to advise a client on whether to voluntarily agree to a treatment regime—one that may or may not be necessary and risky—or to take a shorter sentence in a plea bargain or after a guilty verdict at trial.²⁰² This very real quandary occurs all too often in specialty courts and places a defender at risk of violating ethical rules against advising clients based on insufficient information or investigation.

Although specialty court advocates argue that the defender is part of the team, such rhetoric is often disputed by reality. An additional concern in specialty courts is the right to status hearings and role of defense counsel at such hearings. As noted above, attorneys often are not present at the many status hearings that can occur during the life of a case in specialty court. Sometimes their absence is attributed to the standard operating procedures of the court as hearings are often called immediately to address violations by defendants. This is a precept of specialty courts: immediate reaction to violations or problems with treatment, with the goal of addressing the treatment issue to insure that a defendant can succeed in treatment. Specialty courts focus more on outcomes and pay less attention to the formality of process and notions of procedural justice, which are central goals of the provision of counsel in criminal proceedings.²⁰³

While Quinn’s article was written almost five years ago, the high speed of the drug court movement that she cautioned against shows no signs of slowing down, and has even broadened its focus to include other courts as set forth

201. This scenario is based on a case that was handled by the students in the Criminal Justice Clinic at Howard Law School. The client, who had no prior criminal record, was arrested and charged with possession of heroin. During the initial processing before arraignment, the client was drug tested and admitted to a long-term addiction to heroin. Even though the drug test results were positive and the client requested to go into the drug treatment court program, he was denied admission because there was no history of drug abuse. The treatment court had defined a history to include multiple positive drug tests. Although the student attorneys pushed for an exception to the treatment court guidelines, the client was not allowed to enter the program and eventually pled guilty pursuant to a plea bargain.

202. See Quinn, *supra* note 22, at 60-61.

203. Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 13, 1999, at 13.

above.²⁰⁴ And while some discussion has focused on the defense role in specialty courts, including the extent and quality of the representation, the widespread nature of these courts raises even more issues regarding the new forced non-adversarial role of defense attorneys practicing in these courts.²⁰⁵

B. Treatment at Any Cost? Additional Issues that Plague the Forced Non-Adversarial Role of Defense Attorneys in Specialty Courts

Additional issues exist with respect to the new role of defense attorneys in the different court variations which embody principles of therapeutic and restorative justice. From a review of literature and my practice experience, I believe that questions still remain on the issue of whether the changed defense attorney role in specialty courts can provide zealous, effective, and competent representation to defendants.

1. Prosecutors Remain Adversarial

Conventional wisdom dictates that the prosecutor's job is to seek justice and not just win cases. The reality is, at times, different. With respect to a host of issues in the criminal justice system, prosecutors "hold the cards" and retain greater power than their counterparts in the defense bar.²⁰⁶ Some might argue their power exceeds that of judges.²⁰⁷ This very often holds true in the context of specialized courts.²⁰⁸ While the mantra of specialized courts is that prosecutors and defenders have to shed their traditional adversarial roles and work together as a team in the best interests of the defendant, the reality is that prosecutors in specialty courts still retain many vestiges of adversarial lawyering. Even though specialty court advocates might insist to the contrary, instances of adversarial prosecuting abound in the various incarnations of specialty courts.

During the initial design and development phase of a specialty court, when prosecution representatives require that pleas of guilty be instituted as a precondition of treatment, i.e., requiring that a jurisdiction embrace a post-adjudication model, they are acting as an adversary protective of its position in the controversy.²⁰⁹ The prosecutors argue for a post-adjudication model in

204. Hoffman, *Therapeutic Jurisprudence*, *supra* note 7, at 2071; *see* Quinn, *supra* note 22, at 74 (discussing high speed drug court movement).

205. *See* NATIONAL DRUG COURT INSTITUTE, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT 1 (Apr. 2003), available at <http://www.ndci.org/CriticalIssues.pdf>.

206. *See* Margareth Etienne, *The Ethics of Cause Lawyering: An Experienced Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 CRIM. L & CRIMINOLOGY 1195, 1235 (2005) (citing interview with attorney who felt powerless against federal prosecutors).

207. Consider, for example, the relationship with the grand jury, the use of police and other resources, the force of charging decisions, and their political power.

208. Casey, *supra* note 7, at 1518.

209. *See supra* note 75 and accompanying text (describing post-adjudication model).

order to protect their ability to go forward with prosecution should a defendant fail in treatment. As treatment often lasts many months up to a full year, prosecutors are concerned that they will lose witnesses and evidence should a case linger for an extended period of time. They are concerned with winning the case, a concept inconsistent with justice in the therapeutic model. Justice in therapeutic jurisprudence is tied to the defendant's success in the proscribed treatment program. Specialty court advocates, however, overlook the adversarialism that prosecutors espouse even at the initial stage of the process. Defenders are very cognizant of this issue, and their anxiety as to the benefit and longevity of specialty courts seems justified.

Moreover, a good number of these courts will only allow the defendant to enter treatment if the prosecution consents.²¹⁰ In determining whether to consent, prosecutors look at more than just the need for treatment or whether the defendant meets the program's previously set guidelines. Prosecutors often take into account prior criminal history (whether charged or uncharged), the desires of people in the community or law enforcement officers familiar with the defendant, factors surrounding the particular factual allegations, such as the crime rate in the neighborhood where the crime took place, and whether denying consent will provide leverage in some other matter, such as encouraging cooperation. With respect to the last factor, the action by the prosecution is both highly adversarial and not the least concerned with the best interests of the defendant. In such an instance, the "teamwork" between the prosecution and defense closely resembles plea bargaining, a classic example of traditional adversarial lawyering.²¹¹

Defense lawyers may be properly concerned with the notion that they must change their way of doing business, while other actors in specialty courts are still conducting business as usual. This can lead to frustration and the sense that defenders have no voice in the process, or when they do participate, that their voice is not heard. This is similar to the frustration that is often cited as a contributing factor in the movement toward specialty courts.²¹² Motivation and job satisfaction are important in maintaining quality defense representation, particularly in the context of indigent criminal defense.²¹³ However, a very real danger exists that this satisfaction and motivation cannot occur in specialty

210. Some specialty courts allow the prosecution to designate which treatment options will be available to a defendant.

211. In the classic case of plea bargaining, the government attorney will make a plea offer that takes into account, from a partisan perspective, the defendant's record, the strength of the government's case, ramifications for future criminality, and the interests of the victim. The defense will evaluate the offer based upon the strength of the government and defense cases, the client's wishes, and the potential sentence that the client will receive, among other things.

212. The lawyers may feel as if their role in the justice system has no meaning, that they are just a cog in the assembly line of justice. *See supra* note 10 and accompanying text.

213. Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240-42 (1993).

courts.

2. *Getting the Treatment and Bearing the Burden: Poor and Minority Populations in Specialty Courts*

Statistics from drug courts indicate that the overwhelming majority of clients in this variation of specialty courts are poor and working class people who belong to minority groups.²¹⁴ This may be explained, in part, by the historical evidence tending to show that law enforcement drug initiatives more frequently target urban areas where larger communities of color and poor people reside.²¹⁵ Therefore, since there are more drug arrests among these populations, minorities and poor persons represent a large percentage of the individuals assigned to specialty courts. It is “almost inevitable” that individuals from these groups who have drug problems, or who fit the criteria for adjudication in other specialty courts, will also more acutely face any problems that are inherent in such courts, including the danger of inadequate defense representation.²¹⁶ This danger has been recognized by prominent specialty court advocates. In its 2001 Resolution Regarding Indigent Defense in Drug Courts, the Board of Directors of the National Association of Drug Court Professionals noted that “the lack of national guidance regarding the role of defenders in drug court has led to wide disparities in defense services, and hence in the quality of justice, particularly for low income people who have no choice in the lawyer assigned to them”²¹⁷

For this reason, specialty courts must address the perceived or real danger of inadequate representation. An effective system of criminal adjudication must be measured by the adequacy of justice received by the most powerless in the community.

3. *Economic Disincentives to Zealous Representation*

The method of defender appointment in specialty courts impacts the defender role and effects the zealotry and competence of these attorneys. In a significant number of jurisdictions where specialty courts operate and institutional defender agencies are not charged with representation in all indigent cases, individual judges routinely appoint defenders to cases that come

214. See McCoy, *supra* note 5, at 1531.

215. NATIONAL DRUG COURT INSTITUTE, CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT 33 (Apr. 2003), available at <http://www.ndci.org/CriticalIssues.pdf>; see also NAT'L ASS'N OF DRUG COURT PROFESSIONALS, A LEVEL OF TEAMWORK NOT OFTEN SEEN: AN INTERVIEW WITH JEFFREY S. TAUBER (Nov.-Dec. 1997), available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#pitfalls>.

216. *Supra* note 215.

217. BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, RESOLUTION REGARDING INDIGENT DEFENSE IN DRUG COURTS (Apr. 19, 2002) [hereinafter NADCP RESOLUTION], available at <http://www.nlada.org/DMS/Documents/1019595446.68>.

before them. These appointments are made for a myriad of reasons. In some instances, there is a list from which the judge can randomly or purposefully choose. In others, the reasoning boils down to a matter of convenience. If the judge is acquainted with a particular lawyer who is present in the courtroom, then she may be appointed because it is the easiest solution. With court appointments, judges, who may be staunch advocates of the specialty court jurisprudence, have an additional level of power over the defender role in specialty courts. The judge, who feels that overzealous representation will bog down the process of treatment and the efficiency of the specialty court, has an additional economic power over a defender's practice.²¹⁸ For example, the lawyer that contests a sanction, argues for a different course of treatment, or vocally disagrees with any procedure in the specialty court may not be appointed by the judge on subsequent occasions. In smaller jurisdictions, such economic power can have a substantial effect on the quality of defender representation. This economic disincentive to zealous advocacy could have wide ranging effects on the quality of representation provided in specialty courts.

PART VI. PROPOSED SOLUTIONS FOR THE PROVISION OF DEFENSE SERVICES IN SPECIALTY COURTS

*"The question isn't: Gosh, are courts supposed to be doing this? It's: What are you going to do about it? How does it fit in? It's no longer a question of whether this should have been invented. They're here."*²¹⁹

While it remains to be seen whether specialty courts will continue or whether they represent the paradigm shift some have noted, there is a growing sense that the problems and issues that have been noted by many scholars and practitioners, especially with regard to the defense role, must be studied, evaluated, and addressed cautiously.²²⁰ As such, there must be more and more consideration of not only the theoretical foundations of this new system of jurisprudence or the rhetorical statements of what these courts wish to do, but more importantly, the practical issues that are raised every day in these types of courts. Court reformers, judges, lawyers, and scholars have to be concerned with real solutions and modifications to address any inequalities, injustices, and ethical or practice issues. At this juncture in the life of specialty court jurisprudence, some modifications can be implemented to make sure that the

218. See Smith, *supra* note 2, at 129 n.250. Even in non-specialty courts, the fee maximums and low hourly rates for court appointed attorneys cause a crisis in access to justice and the quality of lawyering.

219. BERMAN & FEINBLATT, *supra* note 113, at 14 (quoting from Greg Berman, *What is a Traditional Judge Anyway?: Problem Solving in the State Courts*, JUDICATURE, Sept-Oct. 2000, at 78-85 (quoting John Goldkamp)).

220. See McCoy, *supra* note 5, at 1515; Quinn, *supra* note 22, at 73-74.

real and perceived non-zealous representation does not blossom into a blight on the nation's specialty courts. The following proposals seek to counteract this danger.

A. Institutionalize Adversarialism into the Defender's Role

Many have called for defense attorneys in specialty courts to continue the tradition of zealous advocacy. Some have likened advocacy in these courts to the traditional model of advocacy at the sentencing stage.²²¹ It is not sufficient, however, to attempt to provide zealous, effective advocacy within the drug court model as these writers suggest, since the structure and operation of the specialty courts frustrate this notion.²²² Rather, it is necessary to change the model that is in existence in most specialty courts today.

If specialty courts are truly experiential and best practices are developed as experience deepens, then it is time to try something new with respect to the defender's role in specialty courts. The issues that have been raised by defenders show no signs of dissipating. If additional variations on problem solving courts continue to develop, the issues will blossom even more. If not addressed, the movement toward specialty court jurisprudence will never achieve full legitimacy.²²³

If prosecutors retain many vestiges of adversarialism, and the judge is a central figure with the power to direct the treatment provided in the specialty court, then there is no good reason for the defender to remain in this category of "forced non-adversarialism."²²⁴ In fact, such an imbalance of power in the specialty court is troubling and may lead to further issues of defense inadequacy. Moreover, the therapeutic and restorative goals of specialty courts can still be accomplished with the traditional model of adversarial defense representation. Since there would still be the provision of treatment and interaction with the judge regarding treatment, the central principles of the specialty court would be met.²²⁵

221. See Clarke & Neuhard, *supra* note 20, at 35.

222. See Robert Burke, *Reconciling Drug Court Participation with Defender Ethical Standards*, INDIGENT DEFENSE, Nov.-Dec. 1997, available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#Reconciling>

223. See Casey, *supra* note 7, at 1503-04.

224. See *supra* note 24 and accompanying text (discussing adversarial nature of court system); *supra* note 100 and accompanying text; Quinn, *supra* note 22; see also Smith, *supra* note 2, at 136.

225. Judge Hardcastle notes many practical advantages of the general adversary process which also benefit the specialty court. Judge Hardcastle specifically recognizes that if the court encourages and allows the defender to advocate more for the client, the specialty court process is more likely to reflect the truth because the judge garners more contextual and relevant information regarding the defendant and her treatment issues. In instances where the defendant has limited knowledge about the legal process, an adversarial defender in a specialty court could assist the defendant in effectively completing treatment and complying with court orders. The specialty court itself could realize cost savings by putting in place a systems whereby the defender could investigate a particular form of treatment or action. An adversarial defender also guarantees that the court operates on credible information from outside agencies or team members that make representations to the court.

Additionally, an adversarial defender is an untapped resource for therapeutic justice in the specialty court context. In conjunction with treatment, which focuses on a particular problem and restoration of some parties, the adversarial defender, who is seen by his client as insuring the individualized fairness of the process, can have a real impact on satisfaction with the court outcome, acceptance of the result, and empowerment of the client. At the very least, a healthy attorney-client relationship compliments the goal of treating the client's social problems. Empowerment of the client, whether through a sense of procedural fairness or because of a relationship with an attorney, can help to lift self-esteem and self-worth. These traits aid the client in recovery from addiction and other social maladies.²²⁶

In specialty courts, therefore, the everyday model of a defender should be one who is zealous, competent, and effective. No matter what the guidelines, eligibility requirements, or rules of the specialty court, defenders should be trained always to: ask for more time to determine if the defendant wishes to enter the treatment program; file any appropriate motions while in treatment court, including motions to dismiss or suppress evidence; challenge the level or extent of treatment if seemingly inappropriate or unworkable for the client; file and assert due process challenges against the imposition of sanctions; argue the substantive inappropriateness of sanctions; thoroughly investigate the factual allegations of the case, with no time bar; and intervene when the judge seeks to illicit incriminating or secret and confidential statements from the client. Such zealous advocacy will not frustrate the goals of the specialty court, but will potentially increase its effectiveness because these actions by defenders will have system-wide beneficial implications. For example, if law enforcement groups understand that abusive and illegal police practices are still challenged in the specialty court, then they might abandon the use of the specialty court as a dumping ground for non-meritorious cases. Additionally, prosecutors might be more careful in determining what cases to bring and which cases to divert completely from the criminal justice system, thereby reducing the number of non-meritorious cases on the specialty court docket. Moreover, specialty court stakeholders, including prosecutors, case managers, and judges, should be trained that when a defender is adversarial and advocates for the rights and wishes of her client, it does not detract from the potential benefit of providing treatment, when appropriate, to a client.

See Hardcastle, *supra* note 24, at 65-67.

226. Client-centered lawyering as an approach to the attorney-client relationship has been noted to enhance client autonomy, self-esteem, and empowerment. *See generally* DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client Centered Representation*, 12 *CLINICAL L. REV.* 369 (2006).

B. Additional Training for Defenders in Specialty Courts

Many scholars and practitioners have called for increased financial resources in order to upgrade the level of practice for indigent defenders.²²⁷ In the context of specialty courts, both institutional defender agency attorneys and private bar attorneys should be trained thoroughly on all aspects of the treatment court, including the science of addiction, therapeutic and restorative justice principles, procedural and substantive due process, “available treatment programs and sanctions, client assessment tools, treatment cycles and methodologies, and . . . the court’s documentation and processes.”²²⁸ Additionally, attorneys should receive training in basic ethics and practice standards, trial and courtroom skills, and legal writing. Only with adequate education and training can we expect to elevate the level of practice in specialty courts.

Requiring such additional training will not be cost prohibitive for court systems because it may only require more ingenuity on the part of specialty court administrators to seek out such training resources and to enter into collaborative agreements with outside providers of such training. Treatment providers that have existing contracts with specialty courts, treatment affinity groups—such as the American Psychiatric Association, the National Mental Health Association, or the National Drug Court Institute—as well as local bar associations or law schools, could be utilized to specifically train defense attorneys.

C. Make Real Changes to the System for Appointment of Counsel

As noted above, judges can assert economic power by controlling the appointments that private attorneys receive in specialty courts. This can chill the zealous advocacy that a lawyer should provide to his client.²²⁹ To combat this possibility or perception, specialty courts should not allow individual judges to appoint lawyers, nor should the court use only a small cadre of attorneys to represent defendants in the particular specialty court. Use of a central lottery appointments process and a system of vertical representation will lessen the impact of economic disincentive to zealous representation.²³⁰

227. See JIM NEUHARD & SCOTT WALLACE, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM SOLVING COURTS (Jan. 1, 2002), available at http://www.nlada.org/DMS/Documents/1019501190.93/document_info; Quinn, *supra* note 22, at 74.

228. See Burke, *supra* note 222; NADCP RESOLUTION, *supra* note 217 (stating “inclusion and training of private counsel appointed to represent indigent defendants in drug court is necessary, particularly in jurisdictions which do not have an institutional public defense entity”); see also, Simon, *supra* note 5, at 1605.

229. See Green, *supra* note 184, at 1178-81 (discussing fees paid to court appointed attorneys and economic incentive to quickly handle numerous cases).

230. See Lisa Schreiberdorf, *The Pitfalls of Defenders as “Team Players”*, INDIGENT DEFENDER, Nov.-Dec. 1997, available at <http://www.nlada.org/DMS/Documents/998934264.745/Defenders%20in%20Drug%20Courts.doc#Pitfalls>.

D. Incorporate a Dual Track System for Specialty Court Cases

Specialty court clients should have the opportunity to contest illegal and abusive police conduct and to assert their innocence at trial without the loss of needed treatment services. In order to accomplish this, cases in which the client wishes to contest the allegations against her should remain on a traditional calendar for normal case adjudication and should, at the same time, proceed on the specialty court calendar where the defendant can receive treatment and services. The specialty court should refrain from any action that will impair the defendant's rights when contesting the case. Court rules should be amended to forbid eliciting incriminatory statements in court and using such statements in any prosecutions.

Many will argue that a dual track is costly for local court systems. This, however, remains to be seen. I suspect that over time, because of less case dumping, smaller numbers of cases in which real, substantive issues are raised will be litigated in the traditional docket and remain on the specialty court docket. The defendant will still be able to receive needed services that may affect her life and potential for life change and benefit.

E. Evaluate and Study the Perception of Defender Role Among Specialty Court Clients

The necessity and value of the criminal defender to our legal system is significant. Even those scholars who question and challenge our current adversarial system and the overzealousness of some advocates recognize the importance of the criminal defender, particularly one who provides indigent defense services.²³¹ The ability of the attorney-client relationship to transform perceptions about the legal system, improve satisfaction with its outcomes, and boost acceptance of its dispositions is substantial and important in both traditional and specialty courts. To clarify the defender's role in specialty courts, court systems and non-profit agencies require more empirical data. Accordingly, they should study defenders', victims', and witnesses' perceptions of lawyering. Additionally, they should examine the effect defense lawyering roles, strategies, and skills have on client decision-making and satisfaction with the process.

F. Conclusion

I am not the first to call for caution in the entrenchment of the methodology and theory of specialty courts in the criminal justice system. Indeed, several authors have noted that the subject demands more discussion, study, and evaluation. If the recent emergence of variations on the drug court model

231. Simon, *supra* note 5, at 1607-08.

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signals a paradigm shift in our system's administration of cases, then the way criminal defenders practice may also shift. We must remain aware of how such a change in defender practice might imperil our legal system and the cultural and impact-setting effect of silent approval of ineffective, under-zealous, and unethical practice. Because defenders are crucial to the principle of justice in all judicial settings, courts must be vigilant about the reality of the defender role and the quality of defender services in emerging models of justice.