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SYMPOSIUM ISSUE

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DRUG COURTS

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Foreword: New Voices in Mental Health and Drug Courts

CHRISTINA A. ZAWISZA*

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“To care for anyone else enough to make their
problems one’s own, is ever the beginning of ethical
development.”

—Felix Adler¹

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1. Felix Adler was an American educator. In 1876, he founded the Society for Ethical Culture in New York City and began the Ethical Movement, which asserted the importance of moral factors in life’s relations. <http://www.britannica.com> (visited October 1, 2012)

I. OVERVIEW

Youth Court. Street Court. Homeless Court. Mental Health Court. Drug Court. Domestic Violence Court. Community Court. Veterans Court.² Such specialty courts are sweeping the nation as manifestations of a problem-solving movement in which judges choose to use therapeutic jurisprudence (TJ) principles to focus on the treatment and resolution of interpersonal and psychological issues that underlie legal problems rather than emphasize punishment or blame.³

Attorneys who practice in Memphis and Shelby County, Tennessee, are fortunate to have courts that have embraced problem-solving concepts and TJ principles to address the social and psychological problems impacting the legal system. One reason for their keen interest is that residents of Memphis and Shelby County suffer from an extremely high poverty rate that affects the County's educational, employment, criminal justice, juvenile justice, child welfare, and intrafamily violence statistics.⁴ In order to address such systemic issues, the Shelby County Court system now has a number of problem-solving courts, including a Youth Court, a Drug Court, a Street Court, a Domestic Violence Court, and a Veterans Court.

Given the demographics of Memphis and Shelby County, Tennessee, it is fitting that the University of Memphis Cecil C. Humphreys School of Law *Mental Health Law & Policy Journal* should focus its first symposium issue on such problem-solving courts. This symposium issue comes as a complement to a two-day conference on *Lawyers as Problem-Solvers: New Directions, New Voices*, held at the Law School on October 18 and 19, 2012, which addressed innovative approaches in legal practice that fall under a

2. See, Christina A. Zawisza and Sandra Newcombe, *Problem-Solving Courts: an Annotated Bibliography*, MENTAL HEALTH L. & POL'Y J. (2013), for further description of these courts.

3. SUSAN DAICOFF, COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION 241 (2011) [hereinafter Daicoff I].

4. Tom Charlier, *Census Calls Memphis Poorest in Nation*, COM. APPEAL, Sept. 23, 2011, <http://www.commercialappeal.com/news/2011/sep/23/census-calls-city-poorest-in-nation/>; *Memphis, Tennessee(TN) Poverty Rate Data-Information about poor and low income residents*, <http://www.city-data.com/poverty/poverty-Memphis-Tennessee.html>.

broad “comprehensive law” umbrella. It was keynoted by Phoenix Law School Professor of Law Susan Daicoff, the country’s leading voice on the comprehensive law movement.⁵

II. COMPREHENSIVE LAW MOVEMENT

What is the comprehensive law movement, and how did it come about? Because the concept of comprehensive law may be unfamiliar to many academics and legal practitioners, the conference organizers⁶ and the *Mental Health Law & Policy Journal* came together to explore some of its many components. According to Professor Daicoff, the comprehensive law movement arose in the 1990’s in response to a “tripartite crisis” faced by the legal profession: dwindling professionalism, declining respect for practicing attorneys, and high levels of psychological distress among lawyers.⁷ It seemingly reflects a resurgence of the legal humanism movement of the 1960’s and 1970’s, which called for lawyers to return to their roles as healers.⁸ The movement may also echo the ethical movement begun by Professor Felix Adler in the late 19th and early 20th centuries, which promoted the importance of moral factors in interpersonal relations.⁹ The comprehensive law movement takes an explicitly wide-ranging, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to the law and legal practice.¹⁰

Ten vectors and four related disciplines constitute the comprehensive law movement, according to Professor Daicoff. The vectors are:

1. Collaborative Law

5. See, Conference Brochure, available at www.memphis.edu/law.

6. Conference organizers include, in addition, to Journal staff, include Memphis Lawyers as Peacemakers, namely: Maureen T. Holland, Chair; Laurie Christensen, Jean Handley, Sheree Hoffman, Linda Warren Seely, Kathy Story, Jocelyn Wurzburg, and Christina Zawisza.

7. Daicoff I, *supra* note 3, at 3 (citing Susan Daicoff, *Lawyer Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997) [hereinafter Daicoff II]).

8. Daicoff I, *supra* note 3, at 41.

9. See, *supra* note 2.

10. Daicoff I, *supra* note 3, at 33.

2. Creative Problem Solving
3. Holistic Justice
4. Preventive Law
5. Problem Solving Courts
6. Procedural Justice
7. Restorative Justice
8. Therapeutic Jurisprudence
9. Therapeutically Oriented Preventive Law
10. Transformative Mediation.

The related disciplines are:

1. Affective Lawyering;
2. Balance in Legal Education/Humanizing Legal Education
3. Mindfulness Meditation
4. Rebellious Lawyering.¹¹

These vectors and related disciplines share common values, objectives, and methodologies. Each explicitly respects the potential of law as an agent of positive interpersonal and individual change. Each seeks to bring about positive results such as healing, wholeness, harmony, or optimal human functioning as part of resolution of legal problems. In addition, each integrates and appreciates factors beyond strict legal rights and duties in law and legal practice. Lawyers are called upon to embrace a client's needs, resources, goals, morals, values, beliefs, psychological matters, personal well-being, human growth and development,

11. Professor Daicoff explicates each vector and related discipline and offers teaching tools in *The Comprehensive Law Movement*, Daicoff I, *supra* note 3.

interpersonal relations, as well as community well-being, in the quest to achieve an effective attorney-client relationship.¹² Comprehensive law is in keeping with the legal profession's Rules of Professional Conduct, which suggest the duty of a lawyer is to advise a client about moral, economic, social, and political factors that may be relevant to a case in addition to black letter law.¹³

III. CONFERENCE CONTRIBUTION TO COMPREHENSIVE LAW UNDERSTANDING

The Lawyers as Problem Solvers Conference that gave rise to this symposium edition explored a number of the vectors and related disciplines of the comprehensive law movement. These included: therapeutically oriented preventive law, therapeutic jurisprudence, comprehensive dispute resolution, collaborative law, legal coaching, and learning styles.

Mr. Dale Hertzler, in his talk on "Doctors as Advocates, Lawyers as Healers," focused on therapeutically oriented preventive law in the field of comprehensive dispute resolution. Comprehensive dispute resolution encourages the actual parties to a dispute to consider the emotions, motives, needs, and goals of others involved in the process, while downplaying or eliminating third-party professional decision-makers and attorneys. It emphasizes cooperation, collaboration, honesty, transparency, full disclosure, and humility.¹⁴ Viewed from a comprehensive dispute resolution lens, doctors must act as advocates and lawyers must function as healers, while still acting within the professional and ethical responsibilities of practitioners in each profession.¹⁵ Such a partnership between lawyers and doctors holds the promise of more effective conflict resolution in the healthcare field.¹⁶ Mr. Hertzler, who has served as legal counsel to hospitals, discussed the importance of early acknowledgement of error and even apology when patients are dissatisfied with their physicians as an incentive to solve problems before they fester into lawsuits.

12. Daicoff I, *supra* note 3, at 36.

13. *See, e. g.*, Tenn. Sup. Ct. R. 8, RPC 2.1.

14. Daicoff I, *supra* note 3, at 141.

15. *See, e. g.*, Amy T. Campbell, *Teaching Law In Medical Schools: First Reflect*, 40 J. L., MED., & ETHICS 301 (2012).

16. Charity Scott, *Doctors as Advocates, Lawyers as Healers*, 29 HAMLINE J. PUB. L. & POL'Y 331 (2008).

Another vector discussed at the October 19th conference was collaborative law, a method of resolving legal disputes, most often used in family law matters, through an alternative dispute resolution process. This method occurs outside of litigation, without the use of third party decision-makers such as arbitrators or judges.¹⁷ Conference presenter Stuart G. Webb, known as the father of collaborative law practice, described the benefits of a collaborative law approach. First, each party in a collaborative law model is represented by an attorney of his/her choice in a settlement mode that hopes to avoid contentious litigation. Next, with a focus on settlement and avoiding court battles, the lawyers and clients are motivated to learn what works to achieve settlement, how to problem-solve, and how to develop win-win skills. Lawyers, furthermore, are freed up to use the lawyering skills of analysis, generation of options, tax and estate planning, and the like. Such an approach results in cost-saving for the client.¹⁸

While collaborative law has its devotees, it also has critics who tout the downside of collaborative law, namely unrealistic expectations, excessive settlement pressure, ethical dilemmas, and the resistance of parties to collaboration and innovation.¹⁹ As collaborative law matures, however, practitioners may find ways to minimize its perils and accentuate its benefits. Collaborative law, for example, might partner with preventive law, mediation and other vectors of the comprehensive law movement to offer a more holistic approach to legal practice.²⁰

Indeed, the presentation of conference leaders Debra Bruce and Dr. Mary Jo Griel on legal coaching took a more holistic approach to the practice of law by addressing the achievement of balance in the legal profession, one of the related disciplines of the comprehensive law movement.²¹ “Balance” is increasingly a subject of scholarship on improving satisfaction in legal education

17. Daicoff I, *supra* note 3, at 172.

18. Letter from Stuart G. Webb, to the Honorable A. M. Keith, Justice of the Minnesota Supreme Court (February 14, 1990) (on file with author).

19. John Lande, *The Promise and Perils of Collaborative Law*, 12 DISP. RESOL. MAG. 29 (2005).

20. Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L. Q. 489 (2009).

21. Daicoff I, *supra* note 3, at 58.

and the legal profession.²² The technique of “legal coaching” pairs an experienced practitioner with a less seasoned lawyer so the newer lawyer can develop leadership, time management, business development, and other practice management expertise, including the achievement of balance between work and home life.²³

Ms. Bruce also demonstrated the technique of “active listening” in her presentation. “Active listening” is one of the communications and relational skills that is a precursor to practicing comprehensive law. It is the ability to listen and pay close attention to another’s statement, and, when the speaker is finished, to recite back to the speaker (or to another, for example, a judge) the content of the statement in a manner in which the speaker “recognizes his story.”²⁴

Another relational skill that lawyers require in order to practice comprehensive law is self-awareness, a tenet often referred to as “lawyer know thyself.”²⁵ One method of self-examination that assists individuals to develop such skills is the Kolb Learning Styles Inventory, discussed at the conference by Professors Patricia Murrell and Christina Zawisza. David Kolb’s experiential learning theory posits that individuals access information through a four-stage cycle involving four adaptive learning modes: concrete experience, reflective observation, abstract conceptualization, and active experimentation. Individuals identify learning styles based on combinations of these four modes,

22. Steven Keeva *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999); Angela Harris, *Toward Lawyering as Peacemaking: A Seminar on Mindfulness, Morality, and Professional Identity*, 61 J. LEGAL EDUC. 647 (2012); Todd Peterson and Elizabeth Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL’Y L. & ETHICS 357 (2009); Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002); Kennon M. Sheldon and Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004).

23. “Lawyer-Coach” materials are available at <http://www.lawyer-coach.com>.

24. Daicoff I, *supra* note 3, at 63-4.

25. Susan Daicoff, *LAWYER KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004) [hereinafter Daicoff III].

and thus people might be characterized as divergers, assimilators, convergers or accommodators. Although these preferences may change over time, they remain relatively stable for most individuals, serving as an accurate predictor of behavior.²⁶

A technique such as Kolb's helps lawyers to identify their own learning preferences and then compare their preferences to the preferred means their clients utilize to process information. The method is a healing technique because it aids practitioners in becoming more effective as holistic counselors and advisors under rules of professional conduct that call for moral, social, economic, and political values in client counseling. It also furthers the goal of "lawyer know thyself" by matching individual preferences with fields of practice in which an attorney might excel. For example, a creative diverger might enjoy trial practice, while a watchful assimilator might choose law teaching.

As the Problem-Solvers Conference illustrated, scholars in the comprehensive law movement range from those who address the precursors to practice, such as relational and self-awareness skills, to those who embrace one or more of the vectors, such as preventive law or collaborative law. Some take a holistic view of the movement by incorporating all of the vectors and related disciplines in their work. Others focus on one aspect of comprehensive law, such as legal coaching or learning styles inventories. Each offers new directions, new voices, and new visions in pursuit of the goal of lawyers as problem-solvers.

26. DAVID KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (1984)

(According to Kolb, a learner who prefers a concrete and reflective mode is a diverger; a learner who prefers an abstract and reflective mode is an assimilator; a learner who prefers an abstract and active mode is a converger; and a learner who prefers a concrete and active mode is an accommodator). *Id.* Aida M. Alaka, *Learning Styles: What Difference Do the Differences Make?*, 5 CHARLESTON L. REV. 133, 148-50 (2011). It is argued that divergent thinking is integral to creative problem solving and can be taught in a law school curriculum. Janet Weinstein and Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835, 841-842 (2003). Other self-examination techniques include the Myers-Brigg Type Indicator (a personality typology), and the Dunn and Dunn VAKT model (visual, auditory, kinesthetic, or tactile learning). *Alaka* at 144-46.

IV. THERAPEUTIC JURISPRUDENCE AND PROBLEM SOLVING COURTS

The overall Lawyers as Problem-Solvers Conference studied the comprehensive law movement with a broad brush. This Symposium edition focuses more narrowly on two vectors of the comprehensive law movement: therapeutic jurisprudence and problem-solving courts. During the symposium portion of the conference, symposium presenters concentrated on mental health courts and drug courts, which were selected by journal editors for their close relationship to mental health law and policy.

Therapeutic Jurisprudence (TJ) and Problem-Solving Courts

Therapeutic jurisprudence is the study of law's healing potential.²⁷ It focuses on the law's impact on emotional life and psychological well-being and is interdisciplinary in nature.²⁸ In essence, TJ suggests that legal rules, legal procedures, legal actors, and the legal system are social forces that produce therapeutic or anti-therapeutic consequences. A consequence is "therapeutic" if it is beneficial for the mental, emotional, and/or physical health of the parties involved, while a consequence is "anti-therapeutic" when it produces results that are detrimental to the mental, emotional, or physical health of individuals.²⁹

The TJ approach was initially introduced in the field of mental health law. Practitioners in that field, scholars urged, should strive to maximize therapeutic outcomes rather than anti-

27. Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 311 (Dennis P. Stolle et. al. eds., 2000) [hereinafter Winick I].

28. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Dennis P. Stolle et. al. eds., 2000) [hereinafter Wexler I].

29. Kevin H. Smith, *Essay-Therapeutic Civil Disobedience: A Preliminary Exploration*, 31 U. MEM. L. REV. 99, 106 (2000) (quoting Patricia Monroe Winsom, Note, *Probate Law and Medicine: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345, 1353 N. 71 (1991)) (citing David B. Wexler, *Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. UPR 691 (1999) [hereinafter Wexler II]). See also, Christina A. Zawisza, *Sprawuj Sie (Do Good): Using the Experience of Holocaust Rescuers to Teach Public Service Values*, 81 REV. JUR. UPR, 1053 (2012).

therapeutic consequences.³⁰ Mental health law, therefore, initially embraced TJ and problem-solving principles in criminal cases that involved individuals with drug and alcohol problems, mental health problems, and problems of family or domestic violence.³¹ Specialized drug courts and mental health courts take an explicitly therapeutic approach to drug-addicted individuals and those who suffer mental disabilities. Such specialized courts use psychological insights about human behavior and the nature of mental illness to offer services that achieve optimal results for clients.³² Judges in problem-solving courts envision their roles as establishing long-term relationships with defendants that are based on interdisciplinary insights and are focused on healing.³³ As is discussed below, each of the symposium writers focus on the successes of the TJ approach in mental health and drug courts.

Illustrations of TJ and Problem-Solving Courts

As the reader begins a review of the featured articles, it might be helpful to keep two concrete examples of the work of problem-solving courts in mind. Symposium presenter Ms. Suzanne Villano introduced participants to John, a bipolar young man, age eighteen, son of a police officer, and resident of Miami Beach. When he took his medication, John functioned appropriately. But on a day when he did not take his medication, he lost control of himself. Voices in his head urged him to “do something crazy.” He took his legally registered gun to the local police station. Rather than aim it at an individual intending to shoot, however, he placed the unloaded gun on the counter. He was

30. DAVID B. WEXLER AND BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY* (1996) [hereinafter Wexler III] (TJ is no longer applied so narrowly). Wexler, *supra* note 28, at 45 (TJ’s reach has vastly expanded to include both micro and macro analysis, global perspectives, and policy reform). Zawisza, *supra* note 29.

31. Bruce J. Winick, *Therapeutic Jurisprudence and Problem-Solving Courts*, 30 *FORDHAM URB. L. J.* 1055 (2003) [hereinafter Winick II].

32. Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in Stolle, *supra* note 27, at 465, 483 [hereinafter Daicoff IV].

33. Daicoff I, *supra* note 3, at 241. Problem-solving courts emanate from a broader realization that problem-solving is an essential attribute of good lawyering, a core value of the legal profession. Mark Neal Aaronson, *Thinking Like A Fox: Four Overlapping Domains of Good Lawyering*, 9 *CLINICAL L. REV.* 1, 5 (2002).

arrested nonetheless, jailed in a solitary cell, and treated as a criminal. The manner in which authorities handled John's case illustrates procedure in a locality that does not have a mental health court, a result that, for John, was decidedly anti-therapeutic.³⁴

One of my first-hand experiences with the application of TJ principles in problem-solving courts at a local level comes from my service as a mentor and judge for the Memphis and Shelby County Youth Court. Juvenile courts were the forerunners to the current generation of problem-solving courts. They began in Chicago in 1899 as an attempt to provide delinquent youth with rehabilitation rather than the punishment that was meted out in adult criminal court.³⁵

Recently, the Memphis and Shelby Juvenile Court found itself confronted by a United States Department of Justice ("DOJ") investigation that discovered black children are disproportionately represented in almost every phase of the juvenile justice system.³⁶ According to DOJ, black children are less likely to receive the benefits of more lenient judicial and non-judicial options, are more likely to be detained in the Juvenile Detention Center rather than released home, and more likely to receive more serious ultimate sanctions. The Shelby County Juvenile Court had a problem to solve.

In came the Youth Court, one effort to address local Disproportionate Minority Contact ("DMC").³⁷ First-time youth offenders may commit less serious charges such as simple assault or battery, disorderly conduct, vandalism, or theft of property.³⁸ With a less serious charge, the option of Youth Court is available to these first-time youth offenders. They are able to go to an informal Youth Court, operated by youth peers and authorized to informally adjust (counsel and advise) the child in order to avoid judicial trial. In undergoing the Youth Court experience, first-time offenders are diverted away from the Detention Center and formal

34. Suzanne Villano, *Mental Health Courts: Protecting Fifth and Sixth Amendment Rights*, 2 MENTAL HEALTH L. & POL'Y J. 153–154 (2013).

35. Winick II, *supra* note 31, at 1056.

36. U.S. DEP'T JUSTICE CIVIL RIGHTS, CIVIL RIGHTS DIV., *Investigation of the Shelby County Juvenile Court* 3 (2012), on file with author.

37. *Id.*

38. TENN. CODE ANN. §37-1-702 (c) (2012) (listing all of the offenses which qualify for teen court treatment).

adjudication and disposition before a judge or magistrate.³⁹ Adjustment relief might include community service, restitution, letters of apology, removal of driver's licenses, and similar dispositions. If the youth successfully completes the adjustment relief, the case is dismissed.⁴⁰ The prosecutors, defenders, and jurors in Shelby County Youth Court are specially trained high school students who are mentored by practicing lawyers. A licensed attorney sits as the judge. Apologies to the victim are often made in open court, and the judge has the opportunity to caution and advise the young person as to the benefits of changing his or her behavior so as never to reappear in the juvenile justice system.

Youth Court is thus a prime illustration of a problem-solving court. The Shelby County model successfully addresses two problems. First, the court reduces the systemic concern about disproportionate minority contact with the court system. Youth Court, secondly, exposes the young person to the positive role models exemplified by the teen court members as well as the practicing attorney mentors. This model epitomizes the cause de vivre of problem-solving courts.

With this backdrop on the comprehensive law movement, therapeutic jurisprudence, and problem-solving courts, I turn to discuss evolving themes and ideas emanating from new scholars in the field. Some key findings and unanswered questions regarding drug and mental health courts that were produced in 2003 by Greg Berman and Ann Gulick aid new research.⁴¹ Drug courts are popular and serve a need, they concluded. Court-mandated treatment results in higher and longer participation in treatment programs, and participants have lower rates of recidivism and drug use while in the program. Even absent treatment, graduated sanctions have a statistically significant impact on offender behavior. Finally, drug courts demonstrate cost savings compared to the costs of traditional adjudication.⁴² Berman and Gulick also

39. See, TENN. CODE ANN. §§37-1-129 & -131 (describing the requirements of judge-run delinquency adjudications and dispositions).

40. TENN. CODE ANN. §37-1-702 (b)(1) & (c)(4).

41. Greg Berman & Ann 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, 1029-31 (2003).

42. *Id.* at 1031-33.

relayed some less positive findings, however. Well-designed post-treatment studies about recidivism in drug courts are relatively sparse, they said, and costs saved by reducing use of jail and prison beds have not been clearly documented.⁴³ Berman and Gulick, therefore, carved out some questions for future study, which open the next section.

V. PROBLEM SOLVING COURTS: NEW DIRECTIONS, NEW VOICES

In this Symposium issue, two new voices begin to answer the questions about drug and mental health courts that Berman and Gulick found lacking in 2003. Do “new” problem-solving courts really work? For what populations? Under what circumstances? What are the core components of such courts, and what are both the long- and short-term post-program outcomes, besides lower recidivism rates? Do they speed up the adjudicatory process? What are their effects on communities? Finally, are they coercive, and do they violate constitutional rights?⁴⁴

Rather than focusing on empirical research, Amanda Peters, an Associate Professor of Law at South Texas College of Law, a former prosecutor and former criminal defense attorney, offers the reader a number of anecdotal success stories regarding drug and mental health courts in several jurisdictions, namely Harris County, Texas; Montgomery, Alabama; and Nashville, Tennessee. She opens her article, *Resource Problem Solving in Therapeutic Courts*⁴⁵ by giving the reader a sense of the proliferation of specialty courts in what she calls the “new generation” of such courts.⁴⁶ She counts more than 2,600 drug courts and 526 DUI courts.

Professor Peters acknowledges that state and local governments embrace the TJ model inherent in drug and mental health courts because it saves the government money. She strives to encourage therapeutic courts to document operational costs by hiring researchers and collecting data from the onset of their

43. *Id.* at 1033—34.

44. Berman & Gulick, *supra* note 41, at 1034—41; *supra* note 41, at 1049—53.

45. Amanda Peters, *Resource Problem Solving in Therapeutic Courts*, 2 MENTAL HEALTH L. & POL’Y J. 121 (2013).

46. Berman and Gulick, *supra* note 41, at 1021—31 (discussing such courts in their “first generation” up to approximately 2003).

programs. Professor Peters also focuses on diversification of funding efforts. She suggests the following opportunities to diversify: Medicaid; state probation funds; state agency budgets; nonprofits; private sector partnerships; legislative initiatives (fees, fines, surcharges, licenses, taxes); abandoned funds; fundraising campaigns; donations; and court participant fees. She concludes that the investment of resources is worthwhile because problem-solving courts save lives.

While identifying the explosion of mental health courts for criminal defendants and recognizing their benefits, Suzanne L. Villano, a Clinical Teaching Fellow at the University of Miami School of Law and a former public defender in Miami, focuses on the protection of defendants' 5th Amendment right to freedom from self-incrimination and 6th Amendment right to counsel. In her article, *Mental Health Courts: Assessing the Need for Formal Court Rules to Protect Fifth and Sixth Amendment Rights for all Participants*,⁴⁷ Villano describes two mental health court models utilized in the United States: (1) the pre-adjudicatory model, which is a diversion model; and (2) the post-adjudicatory model, which requires a mandatory plea with the deferral of sentencing until defendants complete a treatment program. In order to protect defendants' 5th Amendment rights, Villano advocates that legislatures adopt the pre-adjudication model, with a statutory grant of "use" or "derivative use" immunity. In order to protect defendants' 6th Amendment rights, she argues that statutory language should be adopted to trigger the right to counsel whenever sanctions are imposed, and that a uniform burden of proof be applied to such sanctions. These statutory reforms will make drug and mental health courts the therapeutic agents for which they were designed.

In reflecting upon the presentations of Professor Peters and Ms. Villano, as well as a third presenter, Dr. Satish Kedia,⁴⁸ a

47. Villano, *supra* note 34.

48. Dr. Kedia and his colleagues, Larita Webb and Lisa Sentiff at the University of Memphis School of Public Health, are non-attorneys who presented an interdisciplinary perspective at the Symposium by providing research on the effectiveness of Tennessee's Alcohol and Drug Addiction Treatment-Driving Under the Influence (ADAT-DUI) program, which serves to treat and rehabilitate DUI offenders in partnership with drug courts. ADAT-DUI provides treatment, education, counseling, vocational training, and aftercare monitoring. The University of Memphis researchers reported dramatically

panel of practitioners in the Shelby County Drug Court endorsed the new ideas put forward in the symposium. The panelists included: Judge Tim J. Dwyer, a jurist in General Sessions Criminal Court, Division 8; Keith Henderson, a licensed clinical social worker and addictions counselor; and Angela Stephen, a counselor and grant writer in Drug Court. They remarked upon the cost savings evident when \$100 a day for jail time is compared to \$13 per day for treatment. They celebrated the seven percent recidivism rate in their court. Mr. Henderson was particularly enthused about the role of a motivational probation officer in promoting recidivism.

Dean Emeritus of the Law School, Dr. Kevin Smith, closed the symposium by coining problem solving courts as “tailored justice in an off the rack world.” TJ, he reflected, is effective and improves the quality of life for specialty court participants. Dr. Smith concluded that in order for the problem-solving court movement to progress, it needs to explore the following questions:

1. What political strategizing is necessary to enable the movement to “go to scale”?
2. What research is needed to document larger cost savings to families, communities, and society?
3. How might the legal academy teach and inspire law students to “practice this way”?
4. How does the movement overcome the gender gap, i.e. the perception that comprehensive law is a female dominated field?

The Symposium edition concludes with *Problem-Solving Courts: an Annotated Bibliography* prepared by the author of this Foreword and her research assistant, second-year law student

successful results over a ten-year period from the ADAT-DUI program: decreased use of substances, increased rates of abstinence, increased rates of employment, and decreased rates of re-arrest and domestic violence. Dr. Kedia concluded that the TJ model is proven to be very effective on all performance measurements in the case of first and repeat DUI offenders and should be encouraged by the court system.

Sandra Newcombe. It provides the reader who has been newly introduced to therapeutic jurisprudence and problem-solving courts with a ready reference guide to the vast reportage on such proliferating courts. It supplements the outstanding scholarship of Dr. Kedia, Professor Peters, and Ms. Villano in this edition. On behalf of the Conference Committee and the Journal Editors, I extend my sincere thanks to all Conference and Symposium presenters. I am encouraged by the new directions, new voices, and new visions they offer the field of comprehensive law.

Resource Problem Solving in Therapeutic Courts

AMANDA PETERS *

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I. INTRODUCTION

The therapeutic jurisprudence movement began almost twenty-five years ago with the opening of the first drug court in 1989.¹ Since that time, the therapeutic movement has flourished.²

* Associate Professor, South Texas College of Law. I would like to thank Mary Covington, Court Coordinator for several therapeutic courts in Houston, for her help with this article, Tommy Choi, for his research assistance, everyone who graciously responded to my inquiries and requests for interviews, and the Therapeutic Jurisprudence Listserv members who guided my research. As always, thanks to my husband, Bret, and children, Simon, Faith, Isaac, and Samuel, who patiently waited many days and nights for me to finish writing and close my Bluebook.

1. The first therapeutic court opened in 1989 in Dade County, Florida. William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 467 (1996). The first mental health court was created in Marion County, Indiana in 1980, but the mental health court movement did not take off until the late 1990s and earlier part of the 2000s. Roger A. Boothroyd et al., *The Broward Mental Health*

Currently, thousands of therapeutic courts operate around the country.³ Therapeutic courts, also known as problem solving or specialty courts, focus their attention on the reasons why criminal defendants commit crimes.⁴ By seeking to treat the root causes of criminal behavior – most often drug addiction, mental illness, or social and emotional problems – these courts attempt to reduce recidivism and improve the quality of life for therapeutic court participants.⁵

Court: Process, Outcomes, and Service Utilization, 26 INT'L J.L. & PSYCHIATRY 55, 55 n. 1 (2003); Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 112 (2007) (identifying first-generation mental health courts as those that began from 1998 to 2003 and second-generation mental health courts as those that began after 2003).

2. Arthur J. Lurigio & Jessica Snowden, *Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, & Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196, 201 (2009) (both drug and mental health courts “have experienced tremendous growth during their relatively short tenures in the criminal justice system”).

3. Though it is hard to find exact numbers of more recent forms of therapeutic courts, such as problem-solving juvenile and veteran’s courts, there are reliable numbers for drug, DWI, and mental health courts. Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints, and Toolkits*, 2 CHAP. J. CRIM. JUST. 7, 11-12 (2011) (reporting that there are 526 driving while intoxicated therapeutic courts and more than 3,700 specialty courts in America). NATIONAL DRUG COURT INSTITUTE, NATIONAL DRUG COURT RESOURCE CENTER: HOW MANY DRUG COURTS ARE THERE?, <http://ndcrc.org/node/348> (stating there are more than 2,600 drug courts currently in operation); Lauren Almquist & Elizabeth Dodd, *Mental Health Courts: A Guide to Research-Informed Policy and Practice*, 2 (2009), http://consensusproject.org/jc_publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/Mental_Health_Court_Research_Guide.pdf (suggesting that as of 2009, there were 250 mental health courts in the nation); “The varieties and forms that the modern drug court has taken reflect the complexities of the problems they address.” Michael D. Jones, *Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges & Practitioners*, 5 PHOENIX L. REV. 753, 754 (2012).

4. Jennifer Skeem & John Petrila, *Problem-Solving Supervision: Specialty Probation for Individuals with Mental Illness*, 2008 CT. REV. 8 (2004).

5. David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges?)*, CT. REV. 22 (2000). Largely because of the extensive plan and monitoring of the

The success of the movement can be attributed to several factors:

Unlike conventional courts, the success [of therapeutic courts] is measured not by how quickly they process cases, how many convictions they produce, or how much jail time defendants receive; but by achieving tangible impacts – less drug use and crime, gains in employment and education, improved mental and physical health, and cost savings from diverting offenders away from jail and prison.⁶

A person participating in a therapeutic court can recover from drug abuse, untreated mental illness, and criminal behaviors associated with these conditions, saving governments thousands of dollars that would otherwise be spent on hospitalizations, incarceration,

parties involved, these courts produce compelling results. For example, one mental health court in South Carolina boasts that more than 83 percent of the individuals who have completed the program have successfully avoided civil commitment and re-arrest. SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH, RICHLAND COUNTY MENTAL HEALTH COURT, http://www.state.sc.us/dmh/forensic/mhc_richland.html (last visited January 4, 2012). Considering that the average inmate typically recidivates within six months and nearly half of individuals experience three or more additional criminal convictions over a lifetime, South Carolina's post-graduation data is impressive. *Id.*

6. Amanda B. Cissner & Michael Rempel, *The State of Drug Court Research: Moving Beyond "Do They Work?"*, NEW YORK: CENTER FOR COURT INNOVATION, 1 (2005), <http://www.courtinnovation.org/sites/default/files/state%20of%20dc%20research.pdf>. A federal study reported that New York's drug courts saved the state \$254 million dollars in 2003 alone. *See also* ABA Justice Kennedy Comm'n, *Report to the ABA House of Delegates*, 31–32 (2004), http://www.abanow.org/wordpress/wp-content/files_flutter/1267911976_20_1_1_7_Upload_File.pdf. Savings to the criminal justice system are not the only reason these courts are economically viable. Other savings these courts produce include "reduced taxpayer-funded health care costs and emergency room visits, reduced dependence on public assistance, and savings to the community through reduced victimization costs." Cissner & Rempel, *supra*, at 6. Improvements to the lives of participants "translate into social improvements for society as a whole." Jason E. Rayne, *An Exposition of the Effectiveness of and the Challenges Plaguing Maine's Juvenile Drug Treatment Court Program*, 62 ME. L. REV. 649, 663 (2010).

and social welfare.⁷ As a result, governments have increasingly supported the formation of these courts by awarding grants and encouraging stakeholders to collaboratively pool resources.

Lowered criminal justice costs may explain government interest in the therapeutic court movement, but advocates of therapeutic jurisprudence are passionate for other reasons. Therapeutic courts are considered more humane than traditional courts. They give defendants who have cycled in and out of the criminal justice system therapy, grace, compassion, hope, and a return to times when the community cared about the healing of its members. “Living in a time when communal structures have substantially broken down, where people lead isolated lives, and where societal pressures may be fragmented or minimal, the drug court milieu provides a group structure for the [participant] — offering support, rehabilitation, resources, and community — where none had existed before.”⁸ Regardless of the reasons why advocates support these special courts, by importing therapy into the criminal courts and removing traditional adversarial legal tactics, thousands of people across the nation have permanently cycled out of the criminal justice system.

Therapeutic courts are often started by judges who are driven to take innovative approaches to criminal justice and are interested in rehabilitative models.⁹ And while the judge’s

7. Greg Berman & Michael Rempel, *Judges Matter: How Courts Reduce Crime and Save Money*, N.Y.L.J. (August 24, 2011), available at http://www.courtinnovation.org/Judges_Matter.pdf (drug court participants save governments \$5,680). See also Teresa W. Carns, et. al., *Therapeutic Justice in Alaska’s Courts*, 2002 ALASKA L. REV. 1, 18, 54 (a defendant being treated and monitored for one year in Alaska’s mental health court costs the State less than \$17,000 whereas treatment in jail costs Alaska \$40,000 per year); Shannon M. Carey et al., *A Methodology for Determining Costs and Benefits Phase II: Testing the Methodology Final Report*, iv, NPC RESEARCH (2005), available at <http://cdm15024.contentdm.oclc.org/cdm/singleitem/collection/p178601ccp2/id/744/rec/11> (participants in California saved the state between \$3,200 and \$20,000 per participant); NATIONAL DRUG COURT INSTITUTE, *THE DRUG COURT JUDICIAL BENCHMARK 1* (2011) (five independent studies estimate that drug courts save taxpayers between two and four times the amount of money that is invested in them).

8. BENCHMARK, *supra* note 7, at 11.

9. GREG BERMAN & AUBREY FOX, *TRIAL AND ERROR IN CRIMINAL JUSTICE REFORM: LEARNING FROM FAILURE IN CRIMINAL JUSTICE REFORM*

commitment and vision can result in short-term success, much more is required to establish long-term success.¹⁰ Sometimes good motives and novel ideas are not enough to succeed in a therapeutic court venture.¹¹

While specialty courts save money long-term, there are still short-term operational costs. In other words, “it costs money to save money.”¹² The Great Recession has made funding for these courts more uncertain.¹³ Years before the recession, David Rottman, Principal Court Research Consultant at the National Center for State Courts, prophesied that the “new generation of specialized forums proliferated in an era of particularly generous funding for criminal justice and an extraordinarily robust economy. The (usually) higher costs associated with specialized courts may prove fatal during an economic downturn.”¹⁴ Unfortunately, this prediction has become a reality in some jurisdictions.

States’ responses to the economic crisis are varied. For example, Nevada¹⁵ and North Dakota¹⁶ were able to prevent

31–32 (2010) (describing two drug court judges as self-confident, relentless, driven, and influential).

10. BENCHBOOK, *supra* note 7, at 13; BERMAN & FOX, *supra* note 9, at 40 (“Denver and Minneapolis [drug court judges] were able to get drug courts started through the sheer force of their will. But they were not able to cobble together the kind of lasting coalitions that were necessary for the drug courts’ long-term survival.”).

11. BERMAN & FOX, *supra* note 9, at 27–43 (detailing the failures of the Denver and Minneapolis drug courts despite heroic, though misguided, efforts by their founding judges).

12. Gwen Florio, *Montana Drug Courts Fight to Retain Funding*, THE MISSOULIAN March 9, 2011, available at http://missoulain.com/news/state-and-regional/montana-drug-courts-fight-to-retain-funding/article_529541f2-4adf-11e0-9f32-001cc4c03286.html.

13. In Montana, for example, the State funded drug courts, then unfunded them, then reinstated the funding due to economic and budget uncertainties. *Id.*

14. Rottman, *supra* note 5, at 24. Though it is not addressed by this article, it is important to note that there are other problems associated with therapeutic court funding. When extra funds are given to specialty courts, this may cause judges within a legal community to fight over those resources, especially when funds are tight, or it might cause in-fighting amongst court personnel, especially when resources are scarce or equated with power, authority, or favor. *Id.*

15. Mikel Chavers, *Mental Health Courts Weather Fiscal Storm*, THE COUNCIL OF STATE GOVERNMENTS, (Sept./Oct. 2012), available at http://www.csg.org/pubs/capitolideas/enews/issue50_2.aspx.

therapeutic court budget cuts. Whereas states like Oregon and Idaho have reduced funding to state therapeutic courts, requiring judges and coordinators to find ways to keep courts operational despite reduced budgets.¹⁷ Still, other courts have suffered worse fates. For instance, despite the fact that Maine's juvenile drug court program generated a net savings of more than \$41,000, the State stopped funding the program in 2009 due to severe budget shortfalls and lower-than-expected enrollment, which forced multiple courts to close their doors.¹⁸

Funding is not the only challenge courts face. Therapeutic jurisprudence is "resource intensive."¹⁹ Though state mental health funding increased during the 1980s, 1990s, and 2000s, states have cut a combined \$1.8 billion from the public mental health system in the last two fiscal years, according to the National Alliance for Mental Illness (NAMI).²⁰ Only four states were able to spare

16. Email from Marilyn Moe, North Dakota Drug Court Coordinator, to author (Sept. 10, 2012, 7:58 CST).

17. Aimee Green, *Multnomah County's Drug Court Faces Budget Ax* (March 11, 2009), available at http://www.oregonlive.com/news/index.ssf/2009/03/multnomah_countys_drug_court_f.html (describing Oregon's economic challenges); Chavers, *supra* note 15 (detailing Idaho's budget cuts to its health and welfare department, which impacts Idaho's mental health courts). Patricia Tobias, Idaho's administrative director of the courts, believes the states' dramatic cuts will result in fewer community mental health treatment teams, fewer mental health court participants, or the courts' resolution to attempt to do the same with less. *Id.*

18. Rayne, *supra* note 6, at 663-67. The economic crisis has not just hurt therapeutic courts in the United States, it has affected courts around the world. For example, in Australia, the Queensland government cut funding to drug courts recently even though the program saved taxpayers \$41 million dollars. Tony Moore, *Diversions Courts Fall Victim to Funding Cuts*, BRISBANE TIMES, Sept. 13, 2012, <http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html#ixzz26OZT2kR9> (citing the reasons for closing, despite the savings, as inconsistency in court operations that "did not justify the amount being spent to keep it operating").

19. Lorana Bartels, *Challenges in Mainstreaming Specialty Courts*, 383 TRENDS & ISSUES IN CRIME & CRIM. JUST. 3 (2009), <http://www.aic.gov.au/documents/5/0/8/%7B5082B5A4-B181-430E-B114-1460D8395C7B%7Dtandi383.pdf>.

20. National Association of State Mental Health Program Directors, *Amid High Demand, States Cut Mental Health Care*, NEW HAMPSHIRE JOURNAL

mental health budgets at the height of the recession.²¹ Unfortunately, these budget cuts affect resources available to mental health court participants. When mental health courts are unable to offer resources for treatment, the court's treatment collaboration with the community, which is critical, is at risk.

Recently, therapeutic jurisprudence scholars and advocates have moved beyond examining whether therapeutic courts work and have begun to examine how courts can work more efficiently.²² In keeping with that focus, this article examines the resource and funding challenges that drug courts and mental health courts have faced in recent years. Part II of this article will examine the importance of documenting operational costs and the role that diversification of funding plays in the long-term success of therapeutic courts, with an emphasis on how these two practices affect drug courts. Part III of this article focuses on mental health courts and their innovation in obtaining resources in communities where they are lacking. The author hopes by spotlighting therapeutic court challenges and innovation, this article may help struggling or new therapeutic courts develop ideas related to funding and resource acquisition.

II. COSTS & FUNDING

The goal of therapeutic courts may be to rehabilitate participants, but court administrators must look beyond treatment and rehabilitation in order to make their courts successful. Therapeutic courts have multiplied, not because they change lives through novel approaches to criminal justice — which is a wonderful end product that converts court observers into supporters of this model²³ — but because they save governments

(March 15, 2011), <http://nhjournal.com/2011/03/15/amid-high-demand-states-cut-mental-health-care>.

21. *Id.*

22. See e.g., Cissner & Rempel, *supra* note 6, at 1; John S. Goldkamp, *Alternative Approaches to Problem Solving*, 29 FORDHAM URB. L.J. 1981, 2004 (2002) ("Our interest has been in not saying, 'Are they effective?' but now moving beyond that and saying instead, 'When they are sometimes effective and sometimes less effective, what are the ingredients that make the difference? What in this package that we talk about really counts?'").

23. BRUCE WINICK & DAVID WEXLER, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS, 24 (2003) (detailing

money. Indeed, a conservative political movement exists with proponents like Jeb Bush, Newt Gingrich, and William Bennett promoting therapeutic jurisprudence as fiscal-minded “prison reform.”²⁴ Nevertheless, obtaining critical funding for any therapeutic court is challenging. Documenting cost savings is the first step in securing long-term funding.

A. Documenting Costs & Savings

It is not enough for therapeutic courts to start strong... courts must remain “organic” or risk deterioration.²⁵ In order to sustain a court over a number of years, challenges and set-backs must be expected; judges and administrators must learn to operate more efficiently and effectively.²⁶ Evaluation is vital in this regard.²⁷ Continued grant funding relies upon proof of a court’s cost effectiveness.²⁸ Indeed, some grants require court evaluation.²⁹

Pennsylvania’s legislators’ change in enthusiasm after witnessing a drug court docket).

24. Right on Crime, *The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers*, <http://www.rightoncrime.com/> (last visited September 16, 2012).

25. See Pamela M. Casey, et al., *Problem-Solving Justice Toolkit*, 4 (2007), available at http://www.ncsconline.org/D_Research/Documents/ProbSolvJustTool.pdf (“The concept of problem-solving in the court context is not static but evolving.”).

26. BENCHBOOK, *supra* note 7, at 41.

27. Evaluation is important not just to determine whether the program is effective in reducing recidivism, thus saving taxpayer funds, but in promulgating the entire model. But it has also had other beneficial, unintended effects:

[T]he dispute over how to measure the success of the program demonstrates the value of having collected this data. As a result of the data collection, we now know that drug courts have a much greater impact on those who graduate than on those who do not finish, so that programs should focus on ways to lower the dropout rates. Whether or not one concludes that drug courts solve the problems they were intended to address, the fact that we now have data to measure their success and improve their outcomes sets them apart from the vast majority of criminal justice programs.

Erica J. Hashimoto, *Class Matters*, 101 J. Crim. L. & Criminology 31, 42 (2011).

28. The same may not be said about mental health courts. “Mental health courts have not grown based on an empirical database demonstrating that they have had a positive impact.” Henry J. Steadman & Allison D. Redlich, *An Evaluation of the Bureau of Justice Assistance Mental Health Court Initiative*,

“[T]he investment of so many resources in special courts must ultimately be justified in terms of their role as agents of change beyond a few courtrooms. A concentration on special court forums can be justified only if there is the prospect of a long-term payoff.”³⁰ Courts that become more efficient with spending and costs are likely to maintain a long-term presence.

In order to prove the cost effectiveness of this court model and secure future grants, therapeutic court personnel must document dollars spent, participants’ arrests before and after graduation from the court’s program, and the number of days each participant spent in jail.³¹ An internet search yields a plethora of court evaluations that illustrate the efficacy of problem solving courts.³² One report, for example, stated that a drug court in Oregon saved the state more than \$88 million in operational and outcome costs over a ten-year period.³³ Oregon’s largest savings

17 (2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/213136.pdf>. Rather, they have grown out of a desire to see individuals with mental illness get the treatment they need to prevent them from unnecessarily recycling in and out of the criminal justice system. *Id.*

29. Interview with Sandy Manfred, Mental Health Court Manager for Spokane, Washington (October 4, 2012); Andrew Cannon, *Therapeutic Jurisprudence in Courts: Some Issues for Practice & Principle*, 16 J. OF JUDICIAL ADMINISTRATION 256, 259 (2007). Grants may impose additional requirements for drug courts. Celinda Franco, Congressional Research Service, *Drug Courts: Background, Effectiveness, and Policy Issues for Congress*, 18-19 (2010), <http://www.fas.org/sgp/crs/misc/R41448.pdf> (requiring drug testing, sanctions, the exclusion of violent offenders in addition to evaluation).

30. Rottman, *supra* note 5, at 26.

31. See Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1, 154 n.594 (2011) (quoting the Santa Clara’s Veteran Court manual as saying “we recognize that if we do not have specific goals and measures of success or lack of success, the program will fail”); Moe, *supra* note 16 (advising new therapeutic courts to “[h]ire a researcher from the start and start collecting data. You must have data to go to your legislature to prove you are saving your state money.”).

32. See e.g., NPC Research, *Publications & Resources*, http://www.npcresearch.com/publications_drug_treatment_courts.php (last visited September 16, 2012) (listing dozens of reports on the efficacy of problem-solving courts around the nation).

33. Michael W. Finigan & Shannon M. Carey, *The Impact of a Mature Drug Court over 10 Years of Operation: Recidivism & Costs*, 49 (2007),

came from lowered recidivism, which resulted in fewer arrests, community victimizations, days spent incarcerated, and incidents of court-ordered treatment, among other things.³⁴ Another study found that of forty-two drug courts, thirty-seven lowered recidivism rates of participants compared to traditional court defendants.³⁵

Not only have reports illuminated how these courts save more money than traditional courts, but they also demonstrate that some specialty courts are more efficient and effective than others. One group of researchers evaluated eighteen drug courts and found that the most effective court improved outcomes over traditional court participants by 62 percent and had a graduation rate of 68 percent, whereas the least effective drug court in the study witnessed a 44 percent decrease in outcomes and had a graduation rate of merely 25 percent.³⁶ Yet another study highlighted the fact

available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf>. There are two kinds of costs associated with therapeutic courts: investment costs and outcome costs. Shannon M. Carey, et al., *Exploring the Key Components of Drug Courts: A Comparative Study of 18 Adult Drug Courts on Practices, Outcomes, and Costs*, 14 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf>. Investment costs include the expense of operating the drug or mental health court program and the costs of supervising and incarcerating participants. *Id.* Outcomes costs are those incurred from recidivism, measured by the participant population and the control group population processed in traditional courts. *Id.*

34. Finigan & Carey, *supra* note 33, at 47. Researchers determined that for every dollar Oregon spent on drug treatment courts, the State experienced a return of 263 percent in savings. *Id.* at 48.

35. Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 58 n.2 (2005).

36. Carey, et al., *supra* note 33, at 88–91; Cissner & Rempel, *supra* note 6, at 5 (describing “mentor” courts and “worst” courts). It is important to note that some practitioners and scholars do not equate “success” with graduation. Some view graduation rates suspiciously. National Association of Criminal Defense Lawyers, *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, 47 (2009), <http://www1.spa.american.edu/justice/documents/2710.pdf> (suggesting that programs with 90 percent success rates are going after “soft” cases and that programs that take harder cases involving tougher crimes are successful with graduation rates just over traditional court “success” rates). Others care less about recidivism rates than the individual changed lives of participants. 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-*

that within a single drug court, some judges were more effective in lowering recidivism by participants (42 percent) than others, who only lowered recidivism slightly (4 percent).³⁷ Courts that manage their resources, funds, and participants more efficiently than others may reduce their risk of closure.

The difference in the management of resources can result in the continued life or the eventual death of a therapeutic court.³⁸ In other words, with some exceptions,³⁹ good stewards of government resources continue to receive financial grants⁴⁰ while those who are not good stewards may see grants cease or diverted to more

Solving Courts, 30 FORDHAM URB. L.J. 1027, 1037 (2003) (suggesting that a measure of success for mental health court participants may be the individual's "improved functionality and quality of life").

37. Finigan & Carey, *supra* note 33, at 36.

38. The Urban Institute, *Are Drug Courts a Solution to the Drug Problem?* (2005), <http://www.urban.org/publications/900803.html> (Marcia Lee, Senate Judiciary Subcommittee on Crime) ("The future of the drug-court program really depends on proven results and educating folks on the Hill about those successes. And the more success the drug-court program has and the more confident that people can be in its success, the more likely that other problem-solving courts will get congressional funding..."). There are other aspects that can sound the death knell for therapeutic courts. The number of enrolled participants may affect continued funding. For instance, a lack of participants caused the end of juvenile drug courts in North Dakota. Moe, *supra* note 16 (due to North Dakota's sudden boom in population due to oil exploration, North Dakota law enforcement officials are turning away from policing drugs and turning to policing more violent crimes, which means fewer drug arrests and fewer drug court referrals). The "life" and funding of a court are inextricably connected. For example, in Maine, when funding was reduced to Maine's juvenile drug court programs, court coordinator positions were cut in half, which resulted in under-enrolled programs. Rayne, *supra* note 6, at 658-59. Consequently, the key components for these courts were compromised, as were the programs and services themselves. *Id.*

39. Rayne, *supra* note 6, at 653-54, 665-66 (even when Maine's juvenile drug courts demonstrated lower costs than typical juvenile courts, the State ended the program following the start of the recession).

40. After California verified its therapeutic courts were saving taxpayer money, the State diverted funds from the Department of Corrections to the courts. Dennis A. Reilly, *Ensuring Sustainability for Drug Courts: An Overview of Funding Strategies*, NATIONAL DRUG COURT INSTITUTE, 5 (2008), http://www.ndcrc.org/sites/default/files/mono8.sustainability_0.pdf.

successful courts.⁴¹ Documenting how these courts save money is just one measure by which courts guarantee future funding.⁴²

B. Obtaining Funding & Grants

Judges who promote the opening of therapeutic courts must do more than convince local or state authorities that there is a need for the court. Judges often have to secure start-up funding, collect data to prove courts are saving money, obtain additional revenue, and cut costs to keep courts operational. The “gone-again, back-again nature of funding” is a persistent cause for concern, but it is only one of many logistical frustrations of managing therapeutic courts.⁴³ For example, the majority of drug courts report that state funding fails to subsidize drug courts.⁴⁴ As a result, therapeutic court personnel must continuously pursue funding from a variety of sources.

41. Stewardship can be defined in many ways. Jennifer Kearns, a juvenile mental health court coordinator in Ohio, stated that after the recession, the court personnel have “been able to reduce paper waste and are recycling more in the community, we are doing more work with less staff and still running evidenced based programming without a reduction in services to the clients that we serve.” Email from Jennifer Kearns, Court Coordinator for the Lorain County Juvenile Mental Health Court in Ohio, to author (October 2, 2012, 10:38 EST) (on file with author).

42. Researchers who study the successes and failures of specialty courts note a few practices that save money. The following practices have been proven to reduce the investment costs of problem-solving courts: enlisting the help and support of community leaders and “stakeholders” in the planning and operation of the court; keeping these stakeholders informed about the progress of the court; requiring all staff, attorneys, and judges to attend all meetings and hearings; intervening early by admitting participants in the therapeutic court program as quickly as possible to reduce time spent in jail; enrolling an appropriate number of participants (not too many, not too few) to spread costs more evenly across the population; and including law enforcement and community supervision personnel in the program. BENCHBOOK, *supra* note 7, at 14, 22-24, 48; BERMAN & FOX, *supra* note 9, at 33, 38 (describing one drug court in Denver that processed cases so quickly that it shaved between seven and fourteen days from participant pre-confinement, which translated into savings of between \$1.8 and \$2.5 million dollars for the community).

43. Florio, *supra* note 12.

44. National Center for State Courts, *Kansas Drug Court Feasibility Study*, 48 (Feb. 2011), http://www.sji.gov/PDF/KS_Drug_Court_Feasibility_Study.pdf (“Sixty-seven percent of states and territories report that state appropriations and/or budgets fail to meet the demand for drug court services.”).

These courts may obtain seed grants, implementation grants, or expansion grants from the federal government,⁴⁵ which may come from a variety of sources.⁴⁶ Federal grants are generally capped at 75 percent of the total cost of the court; non-federal money is required to provide the remaining quarter in funds or services.⁴⁷ The United States Department of Justice recently budgeted more than fifty million dollars in grants to assist therapeutic courts across the nation.⁴⁸ But the “strings” that come with federal funding may make these grants less desirable to prospective applicants.⁴⁹ Federal grants may be problematic in other ways as well.

Grants cannot fund courts permanently.⁵⁰ Rather, they serve as implementation measures and are used to establish a court while the staff pursues other revenue sources.⁵¹ Federal grant money may be limited to new or young problem-solving courts.⁵² Furthermore, grant money may be spread thin. As the therapeutic court movement grows, grants must be distributed across additional courts, resulting in fewer grant dollars available per court, unless governments increase total grant dollars to meet specialty court expansion.⁵³

Federal funds tend to be more generous to new drug courts, and Substance Abuse and Mental Health Services Administration

45. Franco, *supra* note 29 at 19-21.

46. *Id.* at 16.

47. *Id.* at 17.

48. OFFICE OF NAT’L DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL BUDGET: FY 2013 FUNDING HIGHLIGHTS, *available at* <http://www.whitehouse.gov/ondcp/the-national-drug-control-budget-fy-2013-funding-highlights> (stating that drug court spending in 2013 will increase by \$17 million whereas the total spending for “problem solving justice” will be \$52 million).

49. Reilly, *supra* note 40, at 1 (“Grants also may include requirements that may not fit the community or the proposed target population in need of services.”).

50. Interview with Mary Covington, Coordinator, Harris County STAR Drug Court, in Hous., Tex. (Sept. 13, 2012).

51. *Id.*

52. WINICK & WEXLER, *supra* note 23, at 24 (stating that federal grants are generally only available for the first two years the court is operational).

53. Hora, *supra* note 3, at 2 (suggesting that courts “effectively utilize diminishing resources”); Covington, *supra* note 50.

(SAMHSA) expansion grants may be handed out benevolently.⁵⁴ New courts applying for these federal grants could receive them, start operating, prepare to expand, and then suddenly be forced to close because of a lack of available state funds to continue operation. States prioritize funding; if therapeutic courts are not a priority, they will not be funded at the state level and will be forced to close as soon as federal money runs out.⁵⁵ Federal funding differs because, though it is generous initially, states are expected to take over these grants eventually.⁵⁶ Therefore, specialty courts must seek funds from a variety of sources.

C. Diversification of Funding

Diversification protects court funding in times of state or national economic crisis in the same way that diversification of investments protects investors in a stock market or an investment crisis. Courts that put all of their fiscal eggs in one basket may experience a sudden and unplanned end to funding. The earliest therapeutic courts learned that program sustainability depended on fund diversification.⁵⁷

Courts must become sustainable by using a variety of funding measures.⁵⁸ If grant funding disappears, a program may be

54. Email from Jeff Kushner, Statewide Drug Court Coordinator for the Mont. Supreme Court, Office of the Court Adm'r, to author (September 14, 2012, 13:38 CST) (on file with author).

55. *Id.*

56. *Id.*

57. The first mental health court in Broward County, Florida, received funding through state funds, local social service funds, and from a lawsuit settlement. Lurigio & Snowden, *supra* note 2, at 202. The second mental health court, located in King County, Washington, used federal funds, local funds from both the criminal justice and mental health services department of government, and contributions from collaborating agencies to begin the court. *Id.* at 203–04.

58. Sarah L. Miller & Abigail M. Perelman, *Mental Health Courts: An Overview and Redefinition of Tasks and Goals*, 33 LAW & PSYCHOL. REV. 113, 116 (2009) (“[E]fforts should be made to sustain the [mental health court] through measuring output and outcomes, formalizing policies and procedures, cultivating funding, and engaging in outreach efforts through several avenues.”). For general information on how drug courts in various states have funded their courts, see Am. U. & Bureau of Justice Assistance, *Drug Court Clearinghouse: Frequently Asked Questions Series: State Funding for Drug Courts: Mechanisms and Practices*, 3 (2004), <http://www1.spa.american.edu/justice/documents/2296.pdf> (detailing how

susceptible to sudden closure.⁵⁹ The Bureau of Justice Assistance, a federal grant agency, warned new problem-solving courts: “[K]eep in mind that, while funding may currently be available to start a problem-solving program, it may not always be there. Remember to plan for future funding, and, in particular, plan for ways to institutionalize the program if it proves to be successful.”⁶⁰ Court personnel can firmly establish their courts by creating long-term funding from a variety of sources.

There are a number of funding sources courts can employ. States sometimes make Medicaid funds available to courts.⁶¹ Courts may tap into state probation funds used to supply services and treatment for probationers.⁶² State agencies may be able to

funding is structured in Kentucky, Louisiana, Maine, Mississippi, Missouri, New Jersey, Tennessee, and Texas).

59. The National Association of Drug Court Professionals hosts sustainability workshops that instruct court personnel on how to maintain funding and sustainability. Covington, *supra* note 50; Reilly, *supra* note 40, at 26 (detailing one coordinator in Missouri’s statement that a statewide tax idea to support the drug court was based on the fact that grant funding was drying up and the court had to examine ways to become sustainable in order to keep its doors open).

60. Bureau of Justice Assistance, *Challenges and Solutions to Implementing Problem Solving Courts from the Traditional Court Management Perspective*, AM. U. 9 (June 2008), https://www.bja.gov/Publications/AU_ProbSolvCourts.pdf.

61. Reilly, *supra* note 40, at 9, 17–20 (detailing use of Medicaid funds to supplement substance abuse treatment and medical care in North Carolina, New York, Rhode Island, Pennsylvania, and Louisiana). Recent Medicaid funding increases for mental health ended on June 30, 2011, which makes obtaining mental health through Medicaid more challenging for individuals who rely upon public mental health services. Ron Honberg et al., *State Mental Health Cuts: A National Crisis*, NAT’L ALLIANCE ON MENTAL ILLNESS, 1 (2011), <http://www.nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=126233>; Teddi Fine, *The Changing Landscape of Medicaid: What You Need to Know and Do to Navigate, Advocate, and Negotiate*, NAT’L ASS’N CNTY. BEHAVIORAL HEALTH & DEV. DISABILITY DIRS., 1 (October 1, 2011), <http://nacbhdd.org/content/Under%20the%20Microscope%2010-11.pdf>. With unemployment rates high due to the recession, fewer people have health insurance, which means more people rely upon public mental health care. Honberg, et al., *supra* note 61, at 6. These cuts have occurred during a time when demand for public health care has increased, but offered services have decreased. *Id.*

62. Covington, *supra* note 50.

grant funds to specialty courts.⁶³ Endowments⁶⁴ and nonprofit organizations⁶⁵ also raise money for specialty courts. But perhaps the best source of revenue comes from state legislatures.⁶⁶

Once state legislatures learn about the money that specialty courts save, they are sometimes willing to budget state funds to ensure the courts' growth. Over the years, legislatures around the country have used money from state coffers to provide therapeutic courts with non-grant funding. These funds provide sustainability for the court.⁶⁷ For example, the legislature in Idaho diverts approximately \$1.5 million annually to the state's drug courts by

63. Reilly, *supra* note 40, at 14–17 (detailing interagency funding agreements in Colorado, Florida, Missouri, and Vermont).

64. Kalamazoo, Michigan, may have the largest and best-known endowment that supports local drug courts. DRUG TREATMENT COURT FOUNDATION OF KALAMAZOO COUNTY, FUNDING, <http://www.drugcourtfoundation.org/funding/> (last visited September 27, 2012).

65. Reilly, *supra* note 40, at 11 (detailing Kentucky's Operation UNITE, a nonprofit organization funded through federal grants and donations, that supports new drug courts and has resulted in the expansion of specialty courts in the state).

66. *Id.* at 5 ("State legislative bodies may be the best catalysts to incorporate drug courts into renewable funding streams. Pursuing state legislative support can provide a local drug court with initial and ongoing funding or continuation funding when federal grants are concluded. Many courts with state legislative support receive specific appropriations through a drug court fund or receive funding through budget modifications to state agencies that trickle down to drug courts."). It is important to note, however, that not everyone believes state legislatures help with the formation of problem-solving courts. The National Association of Criminal Defense Lawyers expressed frustration in the "backloading" of treatment through specialty courts:

Robert Hooker, the late public defender for Pima County, Arizona, put it best: 'What we're doing by setting up these courts is backloading the issue, backloading the treatment, when in fact we ought to be front-loading the treatment I fear that by setting up problem-solving courts like this, we are enabling our legislators and our leaders to fail to properly fund treatment programs, education, and health services, because we have given them the excuse not to do that.'"

National Association of Criminal Defense Lawyers, *supra* note 36, at 46.

67. National Center for State Courts, *supra* note 44, at 48–49 ("Of the states that reported sufficient funding for drug courts, all had implemented statewide sustainability strategies that enhance institutionalization and generate substantial funding to potentially take the drug court model to scale.").

assessing a two percent surcharge on alcohol sales.⁶⁸ Mississippi uses criminal fees to subsidize its Drug Court Fund; these fees generate \$1.7 million to the state's drug courts annually.⁶⁹ Texas has also passed legislation to assess fees and divert funds to therapeutic courts.⁷⁰ Every Texan convicted of a drug or alcohol offense must pay \$60 in fees, a small portion of which is diverted to counties within the state.⁷¹ Texas counties with drug courts may keep a larger percentage of this fee "to be used exclusively for the development and maintenance of drug court programs."⁷²

Funding from municipalities and county-level governments can sustain specialty courts as well. Localized funding measures often come from regional fines, taxes, licenses, and fees.⁷³ Drug courts in Florida, Kansas, Missouri, and South Carolina have relied upon these measures for funding.⁷⁴ Often, fees charged to drug court participants fund the overall operation of the court.⁷⁵ Notably, if a large part of funding comes from participant-based fees, the court must accept enough referrals to keep the court operational.⁷⁶

68. Reilly, *supra* note 40, at 7.

69. *Id.* at 12; MISS. CODE ANN. § 99-19-73 (West 2012).

70. TEX. GOV'T CODE § 509.016 (b) (West 2012); TEX. HEALTH & SAFETY CODE ANN. § 469.001 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 102.0178 (West Supp. 2012).

71. TEX. CODE CRIM. PROC. ANN. art. 102.0178 (West Supp. 2012).

72. *Id.* at art. 102.0178 (e)(2) (West Supp. 2012). Interestingly, this drug and alcohol fee was initially meant to give counties with drug courts 10 percent of the entire fee with the remaining 90 percent going into the State's general revenue fund. Covington, *supra* note 50. Drug court personnel and advocates returned to the legislature and negotiated a change that is reflected in the statute itself. *Id.* Now counties without drug courts receive 10 percent whereas counties with drug courts receive an additional 50 percent of the revenue generated from these fees. *Id.*; TEX. CODE CRIM. PROC. ANN. art. 102.0178 (e)(2) (West Supp. 2012).

73. Reilly, *supra* note 40, at 25–26 (detailing revenue directed to drug courts through Charleston's marriage license and probate filing fees, Florida's \$65 criminal court fine, Missouri's anti-drug tax, and Kansas's license to sell tobacco or drug paraphernalia).

74. *Id.*

75. *Id.* at 26–30 (listing Utah, Missouri, Oregon, Arizona, California, Minnesota, Michigan, and Nebraska as states that use drug court participant fees and fines as a measure to fund the states' drug courts).

76. A lack of referrals may not only lead to a lack of funding, but may be the basis for the state closing the court. Rayne, *supra* note 6, at 653–54, 665 (in

Local contributions may have other origins as well. “[F]unding sources on the local level include abandoned property funds, abandoned trust funds, punitive damage awards, and non-dispersed class action funds.”⁷⁷ Indeed, the first mental health court, located in Florida, used part of a lawsuit settlement to fund the court initially,⁷⁸ as did Maine’s drug courts.⁷⁹

Contributions from nonprofit organizations may also play a significant role in the economic sustainability of a therapeutic court. Some courts create 501(c)(3) fundraising organizations or form partnerships with established nonprofits.⁸⁰ However, judges must be careful when it comes to participating in fundraising, as some activities may violate judicial canons of ethics.⁸¹ Nevertheless, beginning a nonprofit may change the community’s perception of the drug court in unexpected ways. One court coordinator in Indiana stated that starting a nonprofit “opened many doors for us, and has helped build our credibility as a social service agency, and not just another government program.”⁸²

While some courts have created partnerships with the private sector,⁸³ numerous counties within Arizona, California, Florida, Indiana, Louisiana, Tennessee, Texas, and Virginia have established nonprofit organizations or nonprofit partnerships to fund or provide resources to drug court programs.⁸⁴ In Houston, Texas, the Harris County Drug Court Foundation,⁸⁵ (“The

the midst of state budget cuts, Maine cut two courts with low enrollment and then cut the entire juvenile drug court program); Moe, *supra* note 16 (stating that one North Dakota juvenile court was closed due to low referrals).

77. Reilly, *supra* note 40, at 23.

78. Lurigio & Snowden, *supra* note 2, at 202.

79. Am. U. & Bureau of Justice Assistance, *supra* note 58, at 3.

80. Reilly, *supra* note 40, at 44.

81. Judges must be careful not to solicit donations personally. Judicial ethics rules prevent them from using their position to persuade individuals to donate money to therapeutic courts. MODEL CODE OF JUD. CONDUCT R. 3.7(A)(1)–(2) (2007). Nor may they force participants to donate money to the court through fines or sanctions. BENCHBOOK, *supra* note 7, at 208. Judges are also prohibited from including their names in communications sent out by third parties to solicit specialty court donations. *Id.*

82. Reilly, *supra* note 40, at 45.

83. Cannon, *supra* note 29, at 259.

84. Covington, *supra* note 50; Reilly, *supra* note 40, at 44–48.

85. HARRIS COUNTY DRUG COURT FOUNDATION, <http://www.hcdcf.org/> (last visited Oct. 12, 2012).

Foundation”) founded by attorneys and judges, contributes goods and services not provided by other revenue sources.⁸⁶ For instance, The Foundation has provided funding for emergency medical care, dental care, recovery support services, housing, transportation, childcare, drug court picnics, gift cards used for participant rewards, and even work supplies for newly employed drug court participants who cannot afford to purchase necessary work items before they receive their first paycheck.⁸⁷ California has a similar approach to supplying courts and participants with miscellaneous items.⁸⁸ Florida has used its Miami-based non-profit drug court foundation to provide home loans to homeless participants, while a drug court in Chesterfield, Virginia, created a nonprofit partnership with private sector partners to increase awareness and raise funds for the court.⁸⁹ Finally, states like Arizona, California, Missouri, and North Carolina have formed partnerships with local charitable organizations that have used fundraising measures to increase drug court revenues.⁹⁰

Whether therapeutic courts generate long-term revenue through legislative measures, local fees and taxes, nonprofit organizations, endowments, fundraising campaigns, or partnerships, court personnel must be committed to raising funds. While grant funding may be used to establish the court and sustain it in the short-term, novel approaches to funding must be developed in order to keep court doors open indefinitely. As more therapeutic courts open across the nation, court personnel must revisit the issue of funding and be open to change as the number of operational specialty courts increases, the economy continues to struggle, and competition for funds intensifies.

III. RESOURCES

Specialty courts treat the social, medical, and addiction issues that cause criminal behavior. According to the founders of therapeutic jurisprudence, Bruce Winick and David Wexler, “the

86. Covington, *supra* note 50.

87. *Id.*

88. Email from Peggy Fulton Hora, Senior Judicial Fellow for the National Drug Court Institute, to Therapeutic Jurisprudence Listserv (August 26, 2012, 2:25 PT).

89. Reilly, *supra* note 40, at 46, 48.

90. *Id.* at 48–51.

courts not only ... resolve disputed issues of fact, but also ... attempt to solve a variety of human problems that are responsible for bringing the case to court.”⁹¹ Solving these “human problems” requires an abundance of therapeutic resources. While adequate substance abuse treatment facilities or programs may exist in many communities,⁹² adequate mental health treatment resources do not.

Mental health services across the country are severely lacking. In its 2009 “Grading the States” publication, NAMI assessed the quality of mental health care in every state in the nation.⁹³ NAMI gave six states a “failing grade;” 21 states, “D’s;” 18 states, “C’s;” and six states, “B’s.” No state earned an “A.”⁹⁴ Since this report card was issued, NAMI has reported “massive” cuts to mental health services at the state level from 2009 to 2011 and projected additional cuts for 2011 and 2012.⁹⁵ This mental health services shortfall explains why governments across the nation have failed to adequately serve and treat mental health consumers and why the nation’s penal system has become the largest provider of mental health care today.⁹⁶

91. WINICK & WEXLER, *supra* note 23, at 3.

92. *But see* National Association of Criminal Defense Lawyers, *supra* note 36, at 47 (quoting a drug court participant recovering from substance abuse as stating, “[i]f treatment is available, you will divert many people before they ever get to the drug court system. Treatment is not available.”).

93. National Alliance on Mental Illness, *Grading the States* (2009), http://www.nami.org/gtsTemplate09.cfm?Section=Grading_the_States_2009.

94. *Id.*

95. Honberg et al., *supra* note 61, at 1.

96. Shane Levesque, *Closing the Door: Mental Illness, the Criminal Justice System, and the Need for a Uniform Mental Health Policy*, 34 NOVA L. REV. 711, 713 (2010) (the “disproportionately high population of mentally ill inmates housed in correctional facilities has made the U.S. penal system the nation’s largest provider of mental health services”); Lurigio & Snowden, *supra* note 2, at 196–97 (“the lack of accessible and affordable mental health care in this country has contributed to the transinstitutionalization of the mentally ill, who are more likely to receive psychiatric treatment in a jail or prison than in a hospital”); U.S. Dep’t of Justice, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernardino, and Anchorage*, 76 (2000) <https://www.ncjrs.gov/pdffiles1/bja/182504.pdf> (“First, if it is true that the court system finds itself having to address the needs of the mentally ill population, it is at least partly because existing institutions and services in the community (at least outside of criminal justice) have failed to serve this population.”).

The percentage of individuals with mental illness who are incarcerated is much greater than the percentage of individuals with mental illness who live in the general population.⁹⁷ One reason many mentally ill individuals are incarcerated is the severe shortage of national mental health resources.⁹⁸ As one federal government report notes, “There is some irony, then, in designing a program that uses the court to place mentally ill and disabled participants in those very systems.”⁹⁹ Mental health courts are attempting to get at the basis for the participant’s criminal activity, which oftentimes is the mental illness itself,¹⁰⁰ when ironically, “the root of the problem is actually the poor quality and low number of mental health treatment services available in the community.”¹⁰¹

For these reasons, accessing resources may be a substantial challenge to mental health courts.¹⁰² Resources are difficult to secure in traditional courts and probation departments,¹⁰³ where

97. Levesque, *supra* note 96, at 715.

98. Lurigio & Snowden, *supra* note 22, at 196–97. “Communities pay a high price for [mental health] cuts... Rather than saving states and communities money, these cuts to services simply shift responsibility to emergency rooms, community hospitals, law enforcement agencies, correctional facilities, and homeless shelters.” Honberg et al., *supra* note 62, at 1. In response to projected mental health cuts, Las Vegas’s District Judge, Jackie Glass, warned Nevada legislators about the wisdom of making cuts at the state level, by saying, “You are either going to pay less now, or more later ... You will see ... people (who lose mental health services) ending up in prisons, jails, emergency rooms, homeless, harassing tourists and breaking into homes.” *Id.* at 8.

99. U.S. Dep’t of Justice, *supra* note 96, at 76; National Association of Criminal Defense Lawyers, *supra* note 36, at 51 (“[M]ental health courts would be unnecessary if society properly addressed mental illness as an illness.”).

100. U.S. Dep’t of Justice, *supra* note 96, at 77 (“In many instances, the mentally ill or disabled find themselves in criminal justice primarily because of their mental illness and their inability to connect with or stay in supportive community-based treatment services.”). *But see* Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 U. D.C. L. REV. 143, 162 (2003) (“Certainly, not every crime committed by an individual diagnosed with mental illness is attributable to disability or the failure of public mental health.”).

101. Miller & Perelman, *supra* note 58, at 119.

102. Farole et al., *supra* note 35, at 67.

103. Lurigio & Snowden, *supra* note 2, at 196. “[C]hronic underfunding has rendered probation far less effective than desired.” Farole, *supra* note 35, at 67.

some judges are paralyzed by their paucity.¹⁰⁴ However, mental health courts require even more of these resources.¹⁰⁵ As a result, the federal government recognizes that mental health courts sometimes face “implementation problems” that are directly linked to resource shortages.¹⁰⁶ This section will analyze the responsibility of mental health court planners in accessing and advocating for better mental health services and identify courts that have been innovative in their approaches to securing resources in communities where they are lacking.

A. The Duty of Mental Health Court Planners to Assess Services Beforehand

Planning is the first step for any therapeutic court, but this stage may be more critical for mental health courts, where community resources are particularly scarce.¹⁰⁷ Judges must carefully explore available resources and needs before they start a court. Examining how many criminal justice system referrals are made to treatment providers in the community will determine whether there is a need for the court that is not yet being filled. Programs must also look ahead to what sources participants will need for graduation and beyond in order to reduce recidivism rates.¹⁰⁸ Readmission rates to treatment, levels of care in the community, and gaps in service availability are all important topics to examine before a court opens.¹⁰⁹

Mental health court participants need access to in-patient and out-patient facilities, counseling professionals, medical professionals, and resources that enable them to live independently. Court planners must make honest assessments

104. *Id.*

105. Bureau of Justice Assistance, *supra* note 60, at 10 (warning courts to respect “finite” community resources by “being careful to avoid ‘depleting the field’”).

106. Office of Justice Programs, Bureau of Justice Assistance, Center for Program Evaluation and Performance Measurement, *What Have We Learned From Evaluations of Mental Health Courts?*, <https://www.bja.gov/evaluation/program-mental-health/mh2.htm> (also recognizing “insufficient funding, and information-sharing problems” as factors complicating mental health court success).

107. Hora, *supra* note 3, at 2 (identifying planning as the first of ten essential elements of mental health courts).

108. BENCHBOOK, *supra* note 7, at 36.

109. *Id.* at 25–26.

about how many participants can be served with existing community mental health services before opening court doors and accepting referrals.¹¹⁰ “Recogni[tion of] resources that do not exist is as important as identification of those that do.”¹¹¹ Placing mental health court participants in programs that cannot meet their needs may unwittingly set participants up for failure.¹¹² Courts should not attempt to accept referrals for participants if they are not able to adequately treat them.¹¹³

Mental health court participants generally experience fewer hospitalizations and greater mental health stability, which translates to health care savings.¹¹⁴ But these savings do not materialize when resources in the community stifle treatment options or the ability to tailor treatment plans to the needs of individual participants.¹¹⁵ In Florida, one participant group and one control group (individuals with mental illnesses whose cases were handled in traditional courts) shared similar symptom abatement rates because the community was unable to provide the extensive

110. Miller & Perelman, *supra* note 58, at 122 (“[T]he criminal justice system cannot exist in a vacuum, but rather must be tied to community services. We know that ignoring offenders’ needs leads to negative criminal justice outcomes and, further, increases the cost to taxpayers.”).

111. BENCHBOOK, *supra* note 7, at 31.

112. U.S. Dep’t of Justice, *supra* note 96, at 76. “No diversion or alternative disposition program, whether prosecutor-driven, court-based, within law enforcement, or jail-based, can be effective unless the services and supports that individuals with serious mental illness need to live in the community are available.” Bernstein & Seltzer, *supra* note 100, at 147.

113. Academics and problem-solving court evaluators share legitimate concerns over the quality of treatment and whether outcomes would be better and courts would be more effective were the quality of treatment improved. Cissner & Rempel, *supra* note 6, at 11.

114. Bartels, *supra* note 19, at 3. Empirical data suggests mental health courts have reduced jail time for mentally ill offenders, decreased recidivism rates, and created better post-incarceration housing. Carns, et. al., *supra* note 7, at 4, 7, 9. One mental health court in Idaho noted that after six years, program participants’ experienced a 98 percent decrease in psychiatric hospitalizations and a 90% decrease in incarcerations. John E. Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence & Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, & Improve Public Safety*, 56 LOY. L. REV. 279, 299 (2010).

115. Miller & Perelman, *supra* note 58, at 116 (“Treatment support and services should be comprehensive and individualized.”).

mental health care that participants needed.¹¹⁶ When a community lacks the appropriate mental health resources, graduating participants will not stay healthy for long and may recidivate more quickly.¹¹⁷

Greater access to mental health services is critical to the success of therapeutic courts.¹¹⁸ “However, many jurisdictions have created few if any new services for [mental health court participants]; thus, a judge’s order to participate in those services does not guarantee program availability in the community.”¹¹⁹ In order to ensure that participants receive necessary services, the mental health community must get involved with the court, the court personnel must match needs of participants with services, and a wide range of resources must be available to meet those needs.¹²⁰ Advocacy plays a role in resource expansion.

Court personnel should promote the growth of community services to meet the current needs of participants.¹²¹ Challenges to proposed mental health budget cuts may seem futile, but court personnel have a duty to increase the availability of treatment services for participants in the community, not idly watch them disappear.¹²² Local governments around the country have encountered a dire lack of services, yet they have nevertheless established mental health courts due to need. Mental health court judges have been both determined and innovative when it comes to locating resources, tapping into unused resources, or creating resources in communities where they are deficient. As one expert noted, “innovations emerge from judicial and community frustration with the justice system’s inability to stem the tide of

116. Lurigio & Snowden, *supra* note 2, at 208 (referring to a Broward County, Florida study).

117. Email from Rebecca Clark, Mental Health Program Coordinator, Skagit Cnty, Wash. Cmty. Serv., to author (September 26, 2012, 13:13 CST) (on file with author).

118. Lurigio & Snowden, *supra* note 2, at 212.

119. *Id.*

120. *Id.* at 211–12.

121. Miller & Perelman, *supra* note 58, at 123 (“It is through continued advocacy that the community mental health system can grow to better accommodate the individuals it was designed to serve.”).

122. Hora, *supra* note 3, at 25, 27 (increasing the availability of treatment services is part of the sixth essential element of mental health courts).

recidivism and violence.”¹²³ The following judges, through determination and innovation, brought therapeutic jurisprudence to communities that desperately needed it.

B. Examples of Mental Health Court Resource Determination and Innovation

In Houston, Texas, local government officials see a direct correlation between increased numbers of incarcerated individuals receiving treatment for mental illness and a decrease in state spending on mental health care. When Texas cut funding for community-based mental health care services by \$400,000,000 in 2003, the Harris County jail population grew by 51 percent over the course of five years.¹²⁴ Harris County’s Mental Health Director, Steven Schnee, stated, “What we have seen is increasingly a criminalization of people with mental illness, such that today the Harris County Jail is now the largest psychiatric facility, serving more psychiatric conditions everyday than the entire state hospital system of the state of Texas.”¹²⁵

Twenty-five percent of the people incarcerated in the Harris County jail are on psychotropic medication and require additional mental health services.¹²⁶ The number of on-hand psychiatrists at the jail between 2003 and 2011 quadrupled, but their salaries and the number of positions were recently reduced due to government budget cuts.¹²⁷ Unfortunately, Texas continues to cut the number of psychiatric beds available at state hospitals.¹²⁸

123. Steadman & Redlich, *supra* note 28, at 9.

124. Patricia Kilday Hart, *Sheriff Learned from Fateful Rookie Encounter*, HOUS. CHRON., Nov. 16, 2011, at B1.

125. Bill Stamps, *County Leaders Say Mental Health Cuts Will Cost More*, KUHf HOUS. PUB. RADIO (April 21, 2011), <http://app1.kuhf.org/articles/1303436410-County-Leaders-Say-Mental-Health-Cuts-Will-Cost-More.html>.

126. Hart, *supra* note 124, at B1 and B3.

127. *Id.* In 2012, the mental health branch of Harris County (MHMRA) cut eight forensic psychiatrists positions and reduced existing forensic psychiatrists’ salaries. Interview with Mark Kent Ellis, 351st District Court Judge, Harris County, Texas (Sept. 17, 2012); Covington, *supra* note 50. “[B]udget cuts have increasingly focused on the elimination or downsizing of programs, services and professional workforce (such as psychiatrists, psychologists, and social workers) as well as on reducing eligibility for services. Honberg et al., *supra* note 61, at 1.

128. Ellis, *supra* note 127. (whereas the State used to have 170 beds, it reduced that number to 150 and recently reduced it further to 135). While the

Ninety percent of the incarcerated inmates in the Harris County jail who qualify for mental health services have been incarcerated in Houston before.¹²⁹ As a result, law enforcement organizations play the most prominent role in the business of mental health care, a role they are both reluctant and ill-equipped to perform.¹³⁰ The Harris County Sheriff, Adrian Garcia, whose department oversees the operation of the jail, estimates that it costs Harris County \$27 million a year to jail the mentally ill, rather than treat them in the community.¹³¹ Harris County's experience is mirrored in cities across America. State legislators, in slashing state mental health care budgets, have left many individuals with mental illness two choices: emergency room treatment or incarceration. Both of these options are burdensome for local governments and less than ideal for individuals who suffer from mental illness.

District Court Judge Mark Kent Ellis has attempted to change the way the criminal justice system treats individuals with mental illness in Harris County. In 2006, Ellis discovered that individuals with mental illness, even when on a special mental health caseload with trained probation officers, were 60 percent more likely to have their probations revoked than individuals without mental illness.¹³² In an attempt to remedy this problem,

number of forensic and civil commitment beds in Texas has been reduced, the number of violent individuals with mental illness who will never be released has grown ever so slightly over the years. *Id.* This means that fewer beds are available each year for individuals who are able to get treatment and re-enter their communities. *Id.* Texas' elimination of beds is not unique. Email from Kerin Raymond, Massachusetts State Drug Court Coordinator, to author (September 27, 2012, 6:56EST) (on file with author) (explaining that despite losing "detox beds, residential and structured out-patient programs over the past couple of years" Massachusetts' budget for social services is still quite large compared to other state budgets). "As the economic crisis has deepened, states have responded by eliminating psychiatric beds in hospitals and by cutting community services." Honberg et al., *supra* note 61, at 7. Nearly 4,000 beds were eliminated or slated for closure across the nation and 14 state hospitals have been closed or are projected to close. *Id.* at 11.

129. Hart, *supra* note 124.

130. *Id.* at B1.

131. *Id.*

132. Ellis, *supra* note 127 (24 percent of individuals on regular probation were revoked in 2006 compared to 39 percent of people on the mental health caseload probation).

Ellis created a specialized probation docket for these individuals.¹³³ Three years later, he started a “mental competency restoration” docket after learning that hundreds of people who were incompetent were waiting in jails to go to the state hospital for evaluation.¹³⁴

Judge Ellis’s two mental health dockets – one for probationers and one for persons deemed incompetent – have served participants well. His probation docket has reduced the percentage of revocations from 39 percent to 4 percent.¹³⁵ Further, nearly 90 percent of individuals on his competency restoration docket have not committed new crimes.¹³⁶ This dramatic drop in revocations and recidivism means that these individuals avoid incarceration, receive consistent treatment, and live life independently.

Judge Ellis’s competency docket has helped restore mental health to individuals who cycle in and out of jails and hospitals without long-term, consistent treatment. Many of these people now experience stabilized mental health for the first time in years,¹³⁷

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Though some critics of therapeutic courts suggest they deplete resources in the community, there is room for debate on this topic. Lurigio & Snowden, *supra* note 2, at 212 (asserting that services must be saved for individuals in the community who are not involved in the criminal justice system); National Association of Criminal Defense Lawyers, *supra* note 36 (accusing drug courts of “sucking up all the resources that the community has to deal with this very thorny issue of addiction”); Bernstein & Seltzer, *supra* note 100, at 147 (“[I]t is critical that [mental health] services exist in the community for everyone, not just [criminal] offenders, and that supports not be withdrawn from others in need and merely redirected to those who have come in contact with the criminal justice system.”); Matthew J. D’Emic, *The Promise of Mental Health Courts: Brooklyn Criminal Justice System Experiments with Treatment as an Alternative to Prison*, 22 CRIM. JUST. 24, 28 (2007) (“[F]unding decisions are made by the legislative and executive branches of government among many interests competing for finite resources. The fact that the judicial branch is taking a new approach in criminal cases involving defendants suffering from mental illness in no way changes that fact or interferes with the efforts of advocates to increase funding for mental health programs.”). In a study of the first mental health court in the nation, located in Broward County, Florida, researchers noted that mentally ill individuals who were defendants in traditional courts access emergency services and intensive residential treatment, which

possess life skills which help them live more independently, and secure housing, which is the reason for programs like these. Judge Ellis says, “We’ve gotten used to the fact that the State has abandoned ship” when it comes to mental health care.¹³⁸ As a result, his dedicated team has stepped in to marshal resources in the community and to advocate for change in the legal system. “When we get together, we find solutions.”¹³⁹

In order to make his mental health dockets participant-friendly, Ellis had to first confront issues related to docket frequency and transportation.¹⁴⁰ Many of the people on Ellis’s dockets are indigent, unemployed, or unemployable; they also have complex medical and psychological treatment schedules that make attending court a challenge.¹⁴¹ Ellis schedules dockets once every ninety days, though the staff and treatment team meet more frequently, and he arranges for transportation with the county so participants are able to come to court.¹⁴² This ninety-day schedule is longer than most court docket settings; therapeutic courts generally have dockets that meet once every two weeks. But Ellis knew if he required these participants to come to court more often, he might set them up for failure.

Ellis appointed attorneys who truly care about the lives of the participants. For instance, the attorneys work hard, often outside regular docket hours, to find places for participants to live

reflects more crisis treatment. Boothroyd et al., *supra* note 1, at 64. These services cost more; moreover, mental health consumers exhaust more resources when they are in crisis than when they are merely maintaining stabilized treatment. *Id.* at 68. New York researchers studying Kendra’s Law, the State’s outpatient civil commitment law, discovered that five years after the law was enacted, it had increased community services for individuals in the community, not depleted them. Marvin S. Schwartz et al., *New York State Assisted Outpatient Treatment Program Evaluation* (2009), MACARTHUR RESEARCH NETWORK (June 2009), http://www.macarthur.virginia.edu/aot_finalreport.pdf. It might be beneficial for drug and mental health court researchers and organizations to study the effects of these programs on the resources available to non-participants living in the community.

138. Ellis, *supra* note 127.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

if they are homeless.¹⁴³ When group homes are full, they may look for temporary housing in shelters or churches until long-term housing becomes available.¹⁴⁴ Staci Biggar, a criminal defense attorney assigned to the court, says, “Every case is unique. There is no cookie-cutter plan. It’s really just learning what resources we have in our communities, which sounds really simple, but it’s not.”¹⁴⁵ Biggar describes herself as “scrappy” when it comes to finding ways to help participants.¹⁴⁶ “We are criminal defense attorneys, not prima donna lawyers who work for big firms. We ask, ‘How do we make it work?’ And then we find a way to make it happen.”¹⁴⁷ The main goal is to locate services and resources that prevent individual participants from mentally decompensating.¹⁴⁸

Individuals on Ellis’ dockets receive life skills training so they can live more independently.¹⁴⁹ Whereas many of these individuals may have cycled in and out of jails, homes, and hospitals, some are now able to work, live on their own, ride the bus, and do other things they were previously unable to do. They receive mental health medical treatment and counseling through local government agencies.¹⁵⁰

Judge Ellis also formed community partnerships in an attempt to gather needed resources. Incompetent individuals will generally be incarcerated for longer than one month; when participants are jailed for more than thirty days, they lose federal disability and unemployment benefits.¹⁵¹ When they challenge the severing of these benefits, their claims are always denied.¹⁵² Judge Ellis hopes that lawyers and law students may be able to appeal the

143. *Id.* A Harris County mental health court planning report recognized the connection between homelessness and criminal involvement and stated that homelessness would be a criterion in accepting participants to the specialty mental health court dockets. Harris County Felony Mental Health Court Planning Team Report 10–11 (2009) <https://www.justex.net/JustexDocuments/0/Mental%20Health/mhctc.pdf>

144. Ellis, *supra* note 127.

145. Interview with Staci Biggar, Attorney at Law, Hous., Tex. (Oct.12, 2012).

146. *Id.*

147. *Id.*

148. *Id.*

149. Ellis, *supra* note 127.

150. *Id.*

151. *Id.*

152. *Id.*

denial of federal benefits to individuals who literally cannot survive without them.¹⁵³ To achieve this goal, he has partnered with South Texas College of Law to develop a legal clinic where law students can help participants regain their lost benefits.¹⁵⁴ His hope is that eager, supervised law students can provide legal services to participants who might otherwise have to appeal terminated federal benefits on their own, a task that is particularly challenging for the competency court participants.¹⁵⁵

In researching Texas' competency restoration process, Judge Ellis discovered ways to make positive changes. When state hospital waiting lists were too long, he used federal stimulus money to hire a local, private hospital to restore competency. The

153. *Id.*

154. *Id.* Losing federal benefits can be devastating to the individual's income level and medical treatment, but it is not the only risk they face from incarceration. Levesque, *supra* note 96, at 716. A person who receives treatment in jail may be limited in the quality of treatment offered, may see symptoms exacerbated while incarcerated due to the added stress one experiences under the circumstances, and may have a harder time receiving social services, housing, or work after incarceration. Derek Denckla & Greg Berman, *Rethinking the Revolving Door: A Look at Mental Illness in the Courts*, 3 (2001), http://www.courtinnovation.org/_uploads/documents/rethinkingthe-revolvingdoor.pdf (stating that upwards of 80 percent of all inmates do not receive treatment while incarcerated); Andrea M. Odegaard, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 234-37 (2007); Debra Baker, *A One-of-a-Kind Court May Offer the Best Hope for Steering Nonviolent Mentally Ill Defendants into Care Instead of Jail*, 84 A.B.A. J. 20 (1998) (mentally ill defendants are at a greater risk for inmate abuse and have an increased risk of suicide); Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507, 510 (2005) (overcrowded jails, with their noise and stress, are not adequate places to house the mentally ill); Bernstein & Seltzer, *supra* note 100, at 143 (arrest can impede a mentally ill person's ability to receive medical care and housing after release).

155. Mental health courts should use college and graduate-level students' assistance, if it is available. See e.g., Henry J. Steadman, Bureau of Justice Assistance, *A Guide to Collecting Mental Health Court Outcome Data*, 12 (2005) http://www.consensusproject.org/jc_publications/guide-to-collecting-mental-health-court-outcome-data/MHC-Outcome-Data.pdf (encouraging mental health courts lacking funds to pay for evaluations to enlist the help of graduate students working on thesis papers or dissertations or to hire them as interns). Drug courts in Vermont are working with local universities to create screening, evaluation, and substance abuse treatment internships to assist participants. Reilly, *supra* note 40, at 16-17.

private hospital was able to restore competency in 30–40 days, whereas the state hospital’s process took 120 days.¹⁵⁶ When state hospital employees learned of the shorter competency restoration time, they took a field trip to the private hospital to learn more.¹⁵⁷ Texas has since remodeled its competency restoration process, saving taxpayers millions of dollars and costing defendants fewer days in custody.¹⁵⁸ Ellis discovered that many individuals arrested for minor criminal offenses served more time in custody awaiting competency restoration than the maximum imposable sentence for their offense.¹⁵⁹ Ellis helped change the law so that individuals are not confined for longer periods of time than their maximum sentence allows.¹⁶⁰ When he testified before the state legislature to recommend this change in the law, he unexpectedly received a generous state grant to continue his court dockets.¹⁶¹ He is currently working with local government officials to make the process of receiving mental health care more efficient, less wasteful, and less cumbersome.¹⁶² Ellis says his role encompasses more than managing dockets; it requires getting involved, taking risks,¹⁶³ helping people live healthier lives, and encouraging

156. Ellis, *supra* note 127.

157. *Id.*

158. Due to a lack of beds, Texas state hospital waiting lists are long. While inmates await transportation to the hospital in local jails, some regain competency. Nevertheless, government bureaucracy required them to be sent to the hospital facility anyway to regain competency. State hospital stays were required to be 120 days long, even if patients regained competency in less than that time or had been detained for periods of time longer than the maximum sentence imposable. This 120-day stay cost taxpayers \$40,000 for each state hospital visit. Judge Ellis determined that approximately fifty Harris County residents regain competency in jail each year, which means that if they were diverted from the State hospital, it would save taxpayers \$2 million. Ellis, *supra* note 127.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. When Ellis began researching mental health courts, he noticed that similar courts took nonviolent participants with misdemeanor offenses. As a felony court judge, he was interested in accepting participants with more violent criminal charges. Over the period of three years, his competency restoration docket accepted participants with charges of murder, rape, sexual abuse, robbery, burglary, arson, auto theft, and manslaughter. While this is a risk some specialty court judges have opted not to take, Ellis believes he serves the

governments to be better stewards of the limited mental health resources available.¹⁶⁴

Other judges around the country have formed partnerships with agencies, tapped into unused resources, and reexamined overburdened services to make the government's approach to mental health care more efficient and the lives of participants better. In Montgomery, Alabama, Judge Tracy McCooey started a mental health court by taking advantage of services that existed but had not been used for problem-solving courts before.¹⁶⁵ Her endeavor began by reaching out to two individuals on her docket who suffered from paranoid schizophrenia.¹⁶⁶ Initially, she met them outside the courthouse after court hours to check on them every week because she genuinely cared about their progress.¹⁶⁷ Eventually, the local mental health agency assigned her a case manager and she created a special docket.¹⁶⁸ Judge McCooey next outsourced all of the available resources from within the local criminal justice system.¹⁶⁹ For example, she obtained the services of a psychiatrist and a therapist who were working inside the jail.¹⁷⁰ McCooey took existing government resources and used them in a way that they had never been used before. Since she began this special docket, the number of participants served has grown,¹⁷¹ as have available resources, through her investigation and determination.

Resource innovation is not exclusive to mental health courts. Judge Seth Norman, a judge in Nashville, Tennessee, began a drug court by tapping into unused, but available, resources.¹⁷²

community better when he accepts violent offenders who with mental stabilization, no longer pose a threat to the community. *Id.*

164. *Id.*

165. *Judge Tracy McCooey: Maverick in Problem-Solving Courts and Restorative Justice*, PART 5, CUTTING EDGE LAW (uploaded Aug 26, 2009), <http://www.cuttingedgelaw.com/video/judge-tracy-mccooey-maverick-problem-solving-courts-and-restorative-justice>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Judge Tracy McCooey: Maverick in Problem-Solving Courts and Restorative Justice*, PART 5, *supra* note 166.

172. *Developing Character During Confinement*, DAVIDSON CNTY. DRUG CT., <http://drugcourt.nashville.gov/portal/page/portal/drugCourt/home/>.

Judge Norman decided to open a drug court in 1995 after he and his colleagues heard about successful drug courts in other parts of the country.¹⁷³ Shortly after starting the Nashville drug court, he determined that a residential drug treatment facility was needed.¹⁷⁴ However, he had no model for such a facility, as no previous drug court had used a similar one.¹⁷⁵

Judge Norman discovered a group of buildings formerly used by the state for a mental hospital that were unoccupied and in need of repairs.¹⁷⁶ He had the buildings inspected and was given permission to use one building as a residential drug treatment facility.¹⁷⁷ He furnished the building with furniture he found in the other unoccupied and abandoned buildings.¹⁷⁸ He asked inmates who wanted drug treatment to temporarily move into the facility and clean it while they lived on-site, promising to get them the treatment they desired.¹⁷⁹ Years later, hundreds of individuals have received long-term drug treatment because of Judge Norman's mission to scrounge together a drug court from unwanted facilities, relying in part on incarcerated volunteers eager for drug treatment.¹⁸⁰ These judges' experiences are not unique.¹⁸¹ In some ways, all therapeutic judges are unwavering visionaries. A need for

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. One community court in Minneapolis, which took a therapeutic approach to individuals living in a high-crime area, began with little money and no support from colleagues, but nevertheless succeeded in changing lives and the greater community. Richard Hopper, *Alternative Approaches to Problem Solving*, 29 *FORDHAM URB. L.J.* 1981, 1989 (2002). Another court, the Albany, Georgia mental health court, began with no funding and little support yet made the court a success by reducing jail time for participants from 120 days to 27 days. Hora, *supra* note 88; GA ACCOUNTABILITY COURTS NEWS, <http://gaaccountabilitycourts.wordpress.com/2009/07/21/dougherty-mental-health-court-a-national-model/> (last visited October 6, 2012) (“[F]or the most, part, [Albany] officials were on their own”).

resources coupled with a lack of them sometimes fuels a judge's resolution to bring about change.¹⁸²

IV. CONCLUSION

Participants, attorneys, and judges who have been fortunate enough to witness the therapeutic jurisprudence model at work understand its power to permanently heal and transform lives. While therapeutic judges report greater contentment with work than traditional court judges,¹⁸³ the downside of the job is the struggle to access funding and resources to keep the court operational. Whether funding comes from forming partnerships with the private sector or creating legislative revenue streams, drug courts must establish that they are cost-efficient and worth the investment. Mental health courts must invest the time to search for the resources participants need in order to recover, whether they

182. Another way to deal with a shortage of resources is to target populations with existing access to services. Many veterans have access to drug and mental health treatment services through the federal benefits available to them. Judges who are constrained resource-wise should be aware that veteran's courts cost local governments virtually nothing. Services are typically provided by the Veteran's Administration (VA) free of charge for the first five years after a veteran's military service has ended. Samantha Walls, *The Need for Special Veteran Courts*, 39 DENV. J. INT'L L. & POL'Y 695, 708 (2011). The federal government acknowledges that it has not responded adequately to the psychological needs of the nearly two million soldiers it has deployed in the last decade. *Id.* at 696–700, 722. Consequently, there may be a waiting list to receive VA care. *Id.* at 707–08. However, the fact that medical and psychological care may come at no cost to the participant and the community makes Veteran's Courts an extremely affordable and attractive therapeutic court option. Veterans who are honorably discharged or released under other honorable conditions and veterans who are uninsured through work or whose lower income qualifies them for free VA services qualify. Covington, *supra* note 50. The Harris County Veteran's Court, in operation since 2009, has only seen three veteran participants not qualify for VA benefits, due to income or insurance through work. *Id.* Nevertheless, these individuals were still able to get the assistance and services they needed, but must get them through their insurance company or with their own funds. *Id.* The VA Justice Outreach Initiative provides all resources and services needed for the participants' treatment. Samantha Walls, *supra* note 182, at 720.

183. Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 231–34 (2009).

are tapped from unused reserves or already exist in the community undiscovered.. Therapeutic court personnel must be resourceful, innovative, and determined to survive. Even successful therapeutic courts struggle with funding and resources; nevertheless, the by-product of these courts — changed lives — is worth the challenge.

Mental Health Courts: Protecting Fifth and Sixth Amendment Rights

SUZANNE VILLANO*

This paper advocates for standardized court rules that guarantee the protections of Fifth and Sixth Amendment rights for all participants. The recent expansion of mental health courts and overwhelming number of individuals with mental illness in the criminal justice system raises many concerns for criminal justice scholars and practitioners since each mental health court operates independently and there are no uniform court rules amongst these courts.

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I. INTRODUCTION

John Washington suffered from severe mental illness. On days he treated his mental illness with medication, he would not reasonably require the services of a criminal defense attorney. When John followed his treatment regimen the voices in his head became faint whispers, his clouded thoughts became clear, and he was able to make rational decisions. After weeks of treatment, John soon convinced himself that he was cured and saw no reason to continue his tedious medication regime. John was appointed a defense attorney after the voices returned when he did not take his medication and the following events took place.

After driving across the bridges that divide wealth from poverty in Miami Beach, Florida, he can no longer ignore the voices in his head, screaming, yelling, and demanding that he “do something crazy.” In the throes of a manic episode, the 19 year old dreadlock African American teenager parks his car in front of the Miami Beach Police Station and grabs his legally registered gun out of the trunk. As the son of a distinguished Miami police officer he is both familiar and comfortable with the police. In broad daylight John walks into the police station lobby, lifts his white shirt and exposes the gun nestled between his white tank top and boxer shorts in the waist of his baggy black pants. John hastily retrieves the gun from his waist, nervously clutches the grip and aims the barrel of the gun towards the ground as he walks to the reception counter. Amidst the voices screaming in his head, John

decides to finally do something. He places the unloaded gun on the counter and steps back.

From a psychological perspective, John's sense of responsibility and subsequent behavior during his desperate cry for help is exceptional. John saved his life and perhaps the lives of countless others. As John steps away from the reception counter armed police officers immediately swarm the lobby and tackle him to the ground. John howls like a wild animal in the holding cell while his father unsuccessfully pleads with his colleagues to send his son to the psychiatric hospital. From a law enforcement perspective, John's conduct is arguably unlawful and he will face severe consequences as a criminal defendant charged with felony assault of a law enforcement officer with a deadly weapon long after he treats his mental illness.

John's entry into the mental health system as a criminal defendant is not uncommon. Over fifty-seven million Americans live with a mental illness in any given year.¹ The U.S. Department of Health and Human Services found that 45.9 million adult Americans,² or approximately 20 percent of the adult population, experienced mental illness in 2010 alone.³ Moreover, of the 45.9 million adults suffering from mental illness in 2010, 11.4 million American adults, or approximately 5 percent of the population, suffered from serious mental illness.⁴ To the layman observer, many behavioral symptoms of mental illness can be perceived as

1. Amy Carter, *Fixing Florida's Mental Health Courts: Addressing the Needs of the Mentally Ill By Moving Away From Criminalization to Investing in Community Mental Health*, J. L. SOC'Y, Winter 2009 at 1.

2. Mental illness among adults aged 18 or older is defined as having had a diagnosable mental, behavior, or emotional disorder (excluding developmental and substance use disorders) in the past year, based on criteria specified in the Diagnostic and Statistical Manual of Mental Disorders. AM.. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000).

3. U.S. DEP'T OF HEALTH AND HUMAN SERV., RESULTS FROM 2010 NAT'L SURVEY ON DRUG USE AND HEALTH: MENTAL HEALTH FINDINGS (2010), available at http://www.samhsa.gov/data/nsduh/2k10MH_Findings/2k10MH_Results.htm

4. *See id.* Serious mental illness is defined as one that resulted in serious functional impairment, which substantially interfered with or limited one or more major life activities.

“bizarre,” “disruptive,” or “dangerous.”⁵ As a result, law enforcement officers are often initially called upon to address community concerns regarding these behaviors.⁶ The National Alliance for the Mentally Ill estimates that up to 40 percent of adults who suffer from a serious mental illness will be arrested and face involvement in the American criminal justice system at some point in their lives.⁷ Following an initial arrest, mentally ill defendants enter the revolving door of correctional facilities.⁸ The disproportionately high population of mentally ill inmates housed in correctional facilities has made the U.S. penal system the nation’s largest provider of mental health services.⁹ Communities nationwide struggle to respond to the high numbers of people with mental illness involved in all points in the criminal justice system.¹⁰ In 2000, Congress addressed this dilemma and provided funding for 100 demonstrational mental health courts.¹¹ Mental health courts are specialty criminal diversion courts that focus on providing mental health treatment for criminal defendants. Empirical research has proven that mental health courts are effective at reducing criminal recidivism and violence.¹² Congress subsequently reauthorized funding for mental health courts in 2004

5. Shane Levesque, *Closing the Door: Mental Illness, the Criminal Justice System and the Need for a Uniform Mental Health Policy*, 34 NOVA L. REV. 171, 718 (Summer 2010).

6. *See id.* at 719.

7. Mentally Ill Offender and Treatment Act, 42 U.S.C.A. §3797 (West 2004).

8. Levesque, *supra* note 5, at 713.

9. *See id.*

10. 42 U.S.C.A. §3797aa. This cite should be 42 USCA 3796ii

11. America’s Law Enforcement and Mental Health Project Act 42 U.S.C.A. § 3796ii.

12. D.E. McNiel and Binder R.L., *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. OF PSYCHIATRY 9 (2007). *See* Morrissey J.P. et al, *New Models of Collaborations Between Criminal Justice and Mental Health Systems*, 166 AM. J. OF PSYCHIATRY 11 (2009). *See* Moore M.E. and Aldige-Hiday V, *Mental Health Outcomes: A Comparison of Re-Arrest and Re-Arrest Severity Between Mental Health Court And Traditional Court Participants*, 41 LAW & HUM. BEHAV., 659 (2006).

and 2008 by enacting the *Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008*.¹³

The Criminal Justice Section of the American Bar Association identified treatment of the mentally ill in the criminal justice system and the expanded role for therapeutic and problem-solving mental health courts (MHCs), as among the most important criminal justice issues in the next three to five years.¹⁴ As MHC's secure their presence in the American criminal justice system, it is imperative to examine the policies and procedures protecting the constitutional rights of the accused. The *Mentally Ill Offender Treatment and Crime Reduction Act of 2004* (MIOTCRA) recognizes the importance of data collection and outcome research and requires each mental health court seeking a MIOTCRA grant to capture outcome data and "(i) identify methodology and outcome measures...to be used in evaluating the effectiveness of the program, (ii) ensure mechanisms are in place to capture data...and (iii) submit specific agreements from affected agencies to provide the data needed by the Attorney General...to accomplish evaluation under this clause."¹⁵ In contrast to the strict requirements for capturing outcome related data, MIOTCRA fails to require mental health courts to create explicit rules to protect the constitutional rights of the accused. In a one sentence paragraph addressing policies and procedures, MIOTCRA rather simply states that mental health courts seeking a grant "shall strive to ensure prompt access to defense counsel for criminal defendants with mental illness who are facing criminal charges that would trigger a constitutional right to counsel."¹⁶ MIOTCRA does not define "prompt access" to defense counsel, or require applicants to identify mechanisms, procedures or rules that will protect the

13. *Mentally Ill Offender and Treatment and Crime Reduction Reauthorization and Improvement Act*, 42 U.S.C.A. §3797aa(h) (2008). Congress reauthorized appropriations of the Adult and Juvenile Collaboration Programs Grants in the amount of \$50,000,000 for each fiscal years from 2009-2014. *See also* the *Mentally Ill Offender Treatment and Crime Reduction Act of 2004* authorizing appropriations for collaborative program grants.

14. Bruce Green, *Criminal Justice—What's Ahead? Roadblocks and New Directions*, 25 CRIM. JUST. 4 (2011).

15. *Mentally Ill Offender and Treatment Act*, 42 U.S.C.A. §3797 (West 2004).

16. *Id.*

constitutional rights of the accused. The lack of specificity in that section coupled with the absence of any standard of review is in stark contrast to the detailed requirements of capturing outcome related data. This begs the question, are the constitutional rights of the accused adequately protected in mental health courts that operate without formal court rules and procedure? Must defendants choose between exercising their constitutional rights and participation in mental health court? Can formal court rules in mental health court protect constitutional rights and operate under the principals of therapeutic jurisprudence?

Mental health courts must enact formal court rules to protect Fifth and Sixth Amendment rights for participants. Part II of this paper will examine the history of mental health courts including the therapeutic jurisprudence model that serves as the foundation of MHCs. Part III of this paper will discuss the Fifth Amendment protection against self-incrimination and the application of the Fifth Amendment in MHCs. Part IV of this paper will discuss the Sixth Amendment right to an attorney and the application of the Sixth Amendment in MHC's. Finally, Part V of this paper will propose uniform court rules to protect Fifth and Sixth Amendment rights for MHC participants.

II. DEVELOPMENT OF MENTAL HEALTH COURTS

The criminalization of mental illness is a significant public health concern in the United States.¹⁷ Deinstitutionalization in the 1950's, the systematic shift in resources from treating people with mental illness in large, residential, state-run psychiatric hospitals to community based treatment,¹⁸ resulted in a dramatic increase of the mentally ill in jails and/or prisons.¹⁹ Jails are now referred to as the

17. Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role Judges*, 57 DEPAUL L. REV. 93, 99 (2007) (stating that as incarceration rates increased over the last twenty-five years, the number of people with mental illnesses in the criminal justice system also steadily increased).

18. *Id.* at 98.

19. *Id.* at 99 (stating that although the number of mentally ill individuals in state psychiatric facilities decreased, the number of mentally ill individuals in prisons rose at a staggering rate).. *See also*, John Petrila and Jeffrey Swanson, *Mental Illness, Law, and a Public Health Law: Research Agenda*, PUB. HEALTH

“new asylum.”²⁰ These new asylums, jails, are built upon main distributive principles of criminal law — i.e. retribution, rehabilitation, incapacitation, and deterrence — and fail tremendously when dealing with mentally ill defendants.²¹

Congress realized that simply incarcerating all mentally ill offenders is a fruitless solution;²² it found that collaborative programs between mental health and criminal justice systems that ensure the provision of services for those with mental illness can reduce the number of mentally ill individuals in adult corrections facilities, while providing improved public safety.²³ In 2000, Congress enacted *America’s Law Enforcement and Mental Health Project* which provided grants to establish and implement no more than 100 demonstration mental health courts.²⁴ Congress enacted MIOTCRA in 2004 to provide implementation and planning grants to existing and new mental health courts.²⁵ In the decade since the enactment of the *Mental Health Project*, over 250 specialty mental health courts operate across the United States, serving an

L. RES. PROGRAM, 12 (Dec. 2010), [http://publichealthlawresearch.org/sites/default/files/Petrila%20%20Swanson%20TPE%20paper-%20Final%20Paginated%20\(1\).pdf](http://publichealthlawresearch.org/sites/default/files/Petrila%20%20Swanson%20TPE%20paper-%20Final%20Paginated%20(1).pdf) (explaining that although deinstitutionalization became the centerpiece of mental health policy [in the 1950’s], it was almost immediately judged a failure, largely because of inadequate community treatment resources).

20. Talesh *supra* note 17 at 98. *See also id.* At 99 (defining transinstitutionalization as the simultaneous increase in imprisonment of people with mental illnesses and decrease of mentally ill people in mental hospitals).

21. Andrew Wasicek, *Mental Illness and Crime: Envisioning a Public Health Strategy and Reimagining Mental Health Courts*, 48 CRIM. L. BULL. 1, 3 (2012). *See also* Georgia Lee Sims, *The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System*, 62 VAND. L. REV. 1053 (2009).

22. Liesel Danjczek, *The Mentally Ill Offender Treatment and Crime Reduction Act and Its Inappropriate Non-Violent Offender Limitation*, 24 J. Contemp. Health L. & Pol’y 69, 72 (2007).

23. *Id.* (stating that Congress found that the majority of individuals with a mental illness...who are involved in the criminal or juvenile justice systems are responsive to medical and psychological interventions that integrate treatment, rehabilitation, and support services).

24. Law Enforcement and Mental Health Project Act 42 U.S.C.A. § 3796ii. *See also* 30 JUST. SYS. J 196, at 204.

25. Mentally Ill Treatment and Offender Act, 42 U.S.C.A. §3797 (2004).

overwhelming number of individuals with mental illness in the criminal justice system.²⁶

A. Therapeutic Jurisprudence and Mental Health Courts

1. Therapeutic Jurisprudence in General

Mental health courts operate under a therapeutic jurisprudence model.²⁷ Touted as the public health approach to the judicial system,²⁸ therapeutic justice recognizes that the law and legal actors, as well as legal rules and procedures, can all have therapeutic (favorable and healthy) or anti-therapeutic (unfavorable and unhealthy) consequences for those who are affected by the court's activities and decisions.²⁹ The goal of therapeutic jurisprudence is to bring sensitivity into law practice and promote an awareness of the psychological and emotional issues affecting the client, including stress, confidence and trust. Courts that rely upon therapeutic jurisprudence theory are also known as problem-solving courts because they take a proactive, and results-oriented posture that is responsive to the current emotional and social problems of participants.³⁰

2. Therapeutic Jurisprudence in Mental Health Courts

Mental health courts are problem solving courts rooted in therapeutic jurisprudence theory.³¹ All mental health courts are designed to focus on the law's impact on participants' emotional and psychological health and rely on interdisciplinary

26. Morrissey J.P. et al, *New Models of Collaborations Between Criminal Justice and Mental Health Systems*, 166 AM. J. OF PSYCHIATRY 11 (2009).

27. Arthur Lurigio and Jessica Snowden, *Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196 (2009) (defining therapeutic justice as the application of social scientific theories and methodologies from a wide variety of disciplines for the purpose of understanding and promoting the psychological well-being of participants in the legal process).

28. Wasicek, *supra* note 21 at 2.

29. Barbara Babb and David Wexler, THERAPEUTIC JURISPRUDENCE. SPRINGER ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE. (2012).

30. Lurigio, *supra* note 27 at 198-199.

31. Wasicek, *supra* note 21 at 1.

collaboration.³² Mental health courts nationwide substitute the problem-solving court model (therapeutic jurisprudence) for traditional criminal court processing.³³ They do so by revising their structure and process of cases and the administration of justice, in order to focus on outcomes and results rather than procedural due process.³⁴ Unlike traditional courts, mental health courts attempt to address the root causes of individual and social problems that lead to criminal behavior.³⁵ Rather than punishing behavior resulting from psychiatric illness, mental health courts act as therapeutic intervention for offenders who might not have access to, or realize the need, for treatment.³⁶ Although there is no single model, the courts have a common goal: to break the cycle of mental illness and criminal behavior and to provide effective treatment options instead of the usual sanctions for offenders with mental illnesses.³⁷

a. Mental Health Court Procedure

Mental health courts operate on a separate docket and include key actors in the courtroom — judges, attorneys, and court personnel — who have specialized knowledge of mental health issues.³⁸ Defense attorneys and other criminal justice officials such as judges or corrections officers, refer criminal defendants to MHCs.³⁹ Once a referral is made, the court screens the criminal

32. Ginger Lerner Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577 (2010).

33. Lauren Almquist and Elizabeth Dodd, *Mental Health Courts: A Guide to Research-Informed Policy and Practice*, COUNCIL OF ST. GOV'TS JUST. CENTER, 5 (2009). http://consensusproject.org/jc_publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/Mental_Health_Court_Research_Guide.pdf

34. Tamar Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 89 (2007) (Meekins 1).

35. Wasicek, *supra* note 21 at 2.

36. *Id.*

37. Bernstein & Seltzer, *The Role of Mental Health Courts in System Reform*, BAZELON CENTER FOR MENTAL HEALTH LAW (2004). http://bazelon.org/LinkClick.aspx?fileticket=xQf5_1grKcI%3D&tabid=104

38. Lurigio, *supra* note 27, at 6. *See also* Wasicek, *supra* note 21, at 6.

39. Danjczek, *supra* note 22 (explaining that if a prosecutor, judge or defense attorney objects to a defendant's participation in MHC or does not feel

defendant to determine if they meet criteria to participate in mental health court.⁴⁰ Although the minimum requirements for enrollment vary across jurisdictions, most courts require that individuals have a diagnosed serious mental illness.⁴¹ Enrolled defendants become “participants” who voluntarily agree to participate in judicially supervised treatment plans developed jointly by a team of court staff and mental health professionals.⁴²

Participants must comply with the court ordered program and attend court status hearings.⁴³ Status hearings allow mental health courts to publicly reward adherence to conditions of participation, sanction non-adherence, and ensure ongoing interaction between the participant and the court team members.⁴⁴ The frequency of a participant’s court status hearings will vary depending on their individual treatment goals, progress in achieving those goals and adherence to program rules.⁴⁵ At the outset of the program the hearings should be frequent and should decrease as a participant progresses positively.⁴⁶

that the defendant is a good candidate for the diversionary program, a referral is denied. All parties involved in the court process, defense attorneys, prosecutors and judges must agree that mental health court is appropriate. Advocates argue mental health courts should permit violent felon participation). *See also* Wasicek, *supra* note 21, at 7.

40. Carter, *supra* note 1 at 12 (noting that violent charges generally do not automatically preclude a defendant from participating in a program and a case that involved a violent charge is reviewed on an individual basis to determine eligibility).

41. Almquist, *supra* note 33 at 10.

42. Almquist, *supra* note 33 at 15 (noting that the waiting periods between referral and enrollment vary widely across mental health courts. According to a 2005 study of seven mental health courts, the wait time between program referral and entrance ranged from 0 to 45 days. In 39 of the cases studied (14 percent), there was no waiting period. When these cases were excluded, the average length of time between referral and entry was 32 days). *See also* H.J. Steadman et al., *From referral to disposition: Case processing in seven mental health courts*, 23 BEHAV. SCI. AND L. 215, 215-216 (2005). *See also* Allison D. Redlich, *Voluntary, But Knowing and Intelligent?*, 11 PSYCHOL. PUB. POL’Y & L. 605 (2005) (analyzing the voluntariness of participants who suffer from mental illness).

43. *See* Wasicek, *supra* note 21 at 7.

44. Almquist, *supra* note 33 at 9.

45. Lurigio, *supra* note 27, at 207.

46. Almquist, *supra* note 33 at 9.

Prior to a status hearing, the courtroom team (judge, defense attorney, prosecutor, probation officer, court coordinator, and case manager) meet for several hours to discuss the cases.⁴⁷ After the meeting, the court will hold an informal status hearing attended by the mental health team and the participant. These hearings are typically recorded by a court reporter and take place in a courtroom. During the status hearing, a judge will generally review a “progress report” from the participant’s mental health provider(s) and offer the participant an opportunity to discuss his treatment in open court.

b. Mental Health Court: Incentives and Sanctions

The routine use of incentives to reward adherence to the treatment plan or other court conditions and sanctions to coerce compliance is prevalent in specialty courts.⁴⁸

Incentives recognize good behavior and encourage recovery through further behavior modification.⁴⁹ Individual praise and rewards, such as coupons, certificates for completing phases of the program, and decreased frequency of court appearances, are helpful and important incentives.⁵⁰ When a participant is non-compliant, judges may impose a variety of sanctions including increased supervision, electronic monitoring, curfews, jail, and removal from the program.⁵¹ Usually, when a defendant agrees to enter a specialty court, the list of sanctions is automatic and non-negotiable; there is little, if any, opportunity for challenge by an

47. *Mental Health Courts: A Primer for Policymakers and Practitioners*, COUNCIL OF ST. GOV'TS JUST. CENTER, 7 (2008), http://consensusproject.org/jc_publications/mental-health-courts-a-primer-for-policymakers-and-practitioners/mhc-primer.pdf

48. See Meekins 1, *supra* note 34, at 89. See also Lurigio, *supra* note 27 at 207.

49. *Improving Responses to Mental Illness: The Essential Elements of Mental Health Court*, COUNCIL OF STATE GOVERNMENTS, 9 (2008) http://consensusproject.org/jc_publications/essential-elements-of-a-mental-health-court/mhc-essential-elements.pdf.

50. See *id.*

51. Lurigio, *supra* note 27, at 207.

attorney.⁵² Removal from mental health court is the considered the most severe sanction.

The sanctions imposed for participants who are removed from mental health court depend on the mental health court model operating in the respective jurisdiction. There are three prevalent mental health court models: pre-plea (aka pre-adjudicatory), post-plea (aka post-adjudicatory) and probationary (aka post-adjudicatory and post-conviction). Mental health courts using a pre-adjudication model do not require a guilty plea or conviction before individuals join the program.⁵³ Charges are often held in abeyance until program completion at which point the charges are dropped.⁵⁴ A post-adjudication model, however, does require a guilty plea or conviction before a potential participant is allowed to enter a mental health court; however, some courts allow participants' records to be expunged upon their successful completion of the program.⁵⁵ Finally, the least common model is the probation model wherein a plea occurs and the mental health treatment is a condition of probation.⁵⁶

In the post-plea model, non-compliant participants who are removed from mental health court become defendants in traditional criminal court and are subject to immediate sentencing by a judge. In contrast, however, in the pre-plea model a defendant preserved his right to proceed to trial or negotiate a plea. Unfortunately, however, if the defendant wishes to proceed to trial, a judge may permit the prosecutor to use a defendant's relevant self incriminating statements elicited for treatment purposes in mental health court against him in a criminal trial. Should the defendant raise the Fifth Amendment protection against self incrimination in mental health court?

52. See Meekins 1, *supra* note 34, at 91.

53. Almquist, *supra* note 33, at 13.

54. See *id.*

55. See *id.* In 2005, the Bazelon Center for Mental Health Law conducted an examination of twenty mental health courts and found that approximately half required a guilty or no-contest plea for program entry.

56. See Talesh, *supra* note 17, at 112.

III. FIFTH AMENDMENT

To properly understand the constitutional privilege against self-incrimination and its applicability in MHCs, it is essential to analyze the purpose, objectives, and limitations of the privilege, as well as the application of the Fifth Amendment right in traditional proceedings.

*A. Purpose and Objectives of the Fifth Amendment Privilege
Against Self-Incrimination*

The Fifth Amendment to the U.S. Constitution states that “no person shall be compelled in any criminal case to be a witness against himself.”⁵⁷ Labeled as the constitutional privilege against self-incrimination, it has two interrelated objectives “the Government may not use compulsion to elicit self-incriminating statements and the Government may not permit use in a criminal trial of self-incriminating statements elicited by compulsion.”⁵⁸ The privilege is directed at insulating an individual from criminal penalties imposed from testimony, or evidence an individual was compelled to give either by physical or mental coercion,⁵⁹ or by threat of contempt.⁶⁰ An essential purpose of the privilege against self-incrimination is to prevent the state, whether by force or psychological domination, from overcoming the mind and will of a person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.⁶¹

*B. Limitations and Expansion of the Fifth Amendment Privilege
Against Self-Incrimination*

The privilege against compelled self-incrimination protects the individual from being involuntarily called as a witness against himself in a criminal prosecution.⁶² It also privileges him against answering official questions asked in any other proceeding where

57. U.S. CONST. amend. V.

58. *Napolitano v. Ward*, 457 F.2d 279, 283 (7th Cir. Ill. 1972) (citing *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 57 n. 6(1964)).

59. *See id.* (citing *Bram v. United States*, 168 U.S. 532 (1897)).

60. *See id.* (citing *Brown v. Walker*, 161 U.S. 591 (1896)).

61. *See In re Gault* 387 U.S. 1 (1967).

62. U.S. CONST. amend. V.

his answers might incriminate him in future criminal proceedings.⁶³ In most contexts, the privilege against self-incrimination is not self-executing.⁶⁴ A person must timely invoke it, or it will be lost unless an exception exists.⁶⁵ A recognized exception exists where a person is threatened and then makes incriminating statements, after invoking his Fifth Amendment rights.⁶⁶ Even after conviction, if a prisoner or parolee is compelled to make incriminating statements, those statements are inadmissible in later criminal proceedings for any crime other than the crime for which the person has already been convicted.⁶⁷

C. Exercising Fifth Amendment Right in Traditional Court Proceedings

In traditional criminal court proceedings, lawyers systemically invoke their client's right against self-incrimination

63. See *Lefkowitz v. Turley*, 94 S.Ct. 316, (1973). See also *In re Morganroth*, 718 F.2d 161 (6th Cir. 1983); See also *Napolitano v. Ward*, 457 F.2d 279 (7th Cir. 1972) *cert. denied*, 93 S.Ct. 512 (1973), and *rehearing denied*, 93 S.Ct. 1351 (1973); *Brown v. U.S.*, 234 F.2d 140 (6th Cir. 1956), *aff'd*, 78 S.Ct. 622 (1958), *rehearing denied*, 78 S.Ct. 776 (1958); *U.S. v. Parente*, 449 F.Supp. 905 (D. Conn. (1978); *French v. Blackburn*, 428 F.Supp. 1351 (M.D.N.C. 1977), *aff'd*, 99 S.Ct. 3091 (1979); *Gulf Oil Corp. v. Tug Kate Malloy*, 291 F.Supp. 816 (E.D.La. 1968); *Quinn v. Petto*, 84 F.R.D. 104 (M.D.Pa. 1979); *Caloric Corp. v. Com., Unemployment Compensation Bd. of Review*, 452 A.2d 907 (1982). Privilege against self-incrimination can be claimed in any proceeding, whether criminal or civil, administrative or judicial, investigatory or adjudicatory. *U.S. v. Sharp*, 920 F.2d 1167 at 1170 (4th Cir. 1990) (citing *Maness v. Meyers*, 419 U.S. 449, 461 (1975)) (citing *Hoffman v. United States*, 341 U.S. 479, 486, (1951)); *Application of Gault*, U.S.Ariz.1967, 387 U.S. 1 (1967). See also *Kastigar v. U.S.*, 406 U.S. 441 (1972), *rehearing denied*, 408 U.S. 931 (1972); *In re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086 (5th Cir. 1980), *rehearing denied*, 625 F.2d 1016 (1980) *In re Commonwealth Financial Corp.*, 288 F.Supp. 786 (E.D.Pa. 1968), *affirmed*, 408 F.2d 640 (1969); *U.S. v. Goldsmith*, 272 F.Supp. 924 (E.D.N.Y. 1967); *Usery v. Brandel*, 87 F.R.D. 670 (W.D.Mich. 1980); *State v. Vickers*, 309 A.2d 324 (Me. 1973); *Ronayne v. Lombard*, 400 N.Y.S.2d 693 (N.Y. Gen. Term 1977).

64. *In re Interest of A.M.* 797 N.W. 2d 233, 258 (Neb. 2011).

65. See *id.* (citing *Roberts v. U.S.*, 445 U.S. 552 (1980); *Garner v. United States*, 424 U.S. 648 (1976); *Maness v. Meyers*, 419 U.S. 449 (1975)).

66. See *Minnesota v. Murphy*, 465 U.S. 420 (1984).

67. See *In re Interest of A.M.*, 797 N.W.2d at 259 (citing *Minnesota v. Murphy*, 465 U.S. 420 (1984)).

and defendants are routinely encouraged to remain silent in court. The defense attorney's role is to protect the defendant from overreaching by the court, police, or prosecutors as well as to keep the defendant from taking actions that will jeopardize the case.⁶⁸ A defense attorney speaks for her client and asserts procedural protections to prevent the client from making admissions of culpable conduct.⁶⁹ Defendants only speak for themselves in court when they testify during trial or speak on their own behalf at sentencing.⁷⁰

D. Fifth Amendment Protections in Mental Health Courts

In mental health courts, the Fifth Amendment right to remain silent applies only if the participant has not pled guilty to the underlying crime, such as in the pre-plea model, or may be compelled to provide information regarding a different crime.⁷¹ While a MHC participant may assert their Fifth Amendment right to remain silent at any stage of the MHC proceedings, information obtained by the prosecutor during the participant's time in the program and prior to the invocation of rights may be used against the person if the case is eventually transferred to traditional criminal court for prosecution.⁷² Participants in MHC who are allowed to discontinue participation do so with prejudice, and any information obtained by the prosecutor during the participant's

68. Meekins 1, *supra* note 34, at 110; *see also* Tamar Meekins, *Specialized Justice: The Over-Emergence of Speciality Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U.L. REV. 1, 22-28 (2006) (Meekins 2).

69. Ben Kempinen, *A Discourse on the ABA's Criminal Justice Standards: Prosecution and Defense Functions: Problem Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L. J. 1349, 1373 (2011).

70. Paul Holland, *New Directions in ADR and Clinical Legal Education: Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J. L. & POL'Y 185, 206 (2010).

71. U.S. CONST. amend. V.

72. For example, the mental health court participant does not enter a plea but volunteers to enter the program. If in response to questioning by the judge the participant mentions the circumstances regarding the underlying crime and/or his culpability, that statement can be used by the prosecutor against the defendant if the participant is unsuccessful in his completion of mental health court and required to return to traditional criminal court.

time in the program may be used against the person when the case is eventually heard in criminal court.⁷³

Invoking the Fifth Amendment protection against self-incrimination presents a significant dilemma for participants in MHCs. A participant in MHC agrees to treatment, and also agrees to be candid and forthright, admit to relapses and missteps, and ultimately, be accountable for the choices he has made.⁷⁴ Admitting relapses and missteps to the judge conceivably requires a participant to discuss new arrests and may require a participant to discuss the underlying crime regardless of whether a conviction was entered by the court. Participants can discuss the new crime and thereby waive their Fifth Amendment right to remain silent in the new case. Alternatively, they can assert their Fifth Amendment right and face possible sanctions because they lack candor and are unable to admit relapses. This begs another question, may a participant exercise his or her Fifth Amendment right to remain silent and still participate in mental health court? Do mental health court judges avoid questioning a participant if elicited answers may incriminate a participant?

Mental health courts must protect Fifth Amendment rights. Consider the predicament that “John” faces if unable to complete the mental health court program. If John enrolls in a pre-adjudicatory mental health court, he does so without entering a plea of guilty to the crime(s) alleged. Once he participates in the program, John discusses his treatment directly with the judge as the court reporter records all of his statements. The judge is at liberty to ask John questions that may elicit information regarding his mental state on the date of the incident, (i.e. John’s thoughts as he entered the police station, whether John was tempted to use the gun in a harmful way, etc). If John is charged with a crime requiring a *mens rea* element to be proven, John’s statement regarding his state of mind is now part of a court record. John’s statement to the judge for treatment purposes is now an admission, a sworn statement against interest easily accessible in the court record. If John returns to traditional criminal court, the prosecutor

73. Carter, *supra* note 1 at 6 (citing Tammy Seltzer, *A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illness*, 11 PSYCHOL., PUB. POL’Y & L. 570, 575 (2005)).

74. Kempinen, *supra* note 69 at 1373.

can explain to the police that they have additional statements made by John regarding the incident that increase their chance of securing a conviction. Finally, the prosecutors can serve John's attorney with a notice of additional discovery, incriminating statements made by the defendant.

In contrast, in a post-plea model, John no longer has a Fifth Amendment right to remain silent about his mental state during the crime because he previously pled guilty. If John attempts to invoke his right to remain silent in a post-plea model, the judge may sanction John or remove him from the program entirely due to non-compliance. In a post-plea model John can move directly to a sentencing hearing. During the sentencing hearing, the prosecution can call police witnesses and victims to testify about John's actions in the police lobby to influence the sentencing judge. Mental health courts must enact formal court rules to protect participants Fifth Amendment and Sixth Amendment rights.

IV. SIXTH AMENDMENT

The Sixth Amendment to the U.S. Constitution guarantees that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel in his defense.⁷⁵ The Sixth Amendment further requires that criminal defendant receive effective assistance of counsel at critical stages of a criminal proceeding.⁷⁶ The constitutional guarantee of effective assistance of counsel applies to pretrial critical stages that are not part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.⁷⁷

A. Sixth Amendment Protections in Mental Health Courts

Mental health court participants should have a Sixth Amendment right to *effective* assistance of counsel during all required court appearances. Although MIOTCRA requires that MHCs seeking a federal grant "shall strive to ensure prompt access

75. U.S. CONST. amend VI.

76. U.S. CONST. amend. VI, *see also* Lafler v. Cooper, 132 S.Ct. 1376 (2012).

77. *See id.*

to defense counsel for criminal defendants with mental illness that would trigger a constitutional right to counsel”, it does not define prompt access or require mental health courts to outline policies and procedures that ensure prompt access. Mental health courts freely interpret this clause without any formal review. Fortunately, most mental health courts secure the presence of a public defender during all court proceedings. Unfortunately, however, the design of the specialty court discourages any challenge or assertion of rights from the defense attorney that may interfere with the course of treatment.⁷⁸ Thus the role of the defense attorney in specialty court embodies no vestiges of the adversarial defender, and therefore takes on a “best interests” mantra.⁷⁹ This shift away from an adversarial defender model means that the zealous advocacy 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.⁸⁰

Defense attorneys often face a serious dilemma when they appear in mental health court, should they zealously advocate for a client when that advocacy is in opposition to the treatment goals of the court. The author recently spoke with a Legal Aid public defender in Manhattan who expressed frustration after her mental health court client failed to inform the judge of a new DUI related arrest that was unlikely to be detected by the court because it occurred in another state. The veteran public defender clearly understood her role in traditional criminal court and would not have advised the judge or prosecution of the information that her client told her in confidence. However, the attorney was uncertain of her role in mental health court and vacillated on the advice that she should provide to her client. The attorney considered the possible sanction that her client faced if the court found that she knowingly withheld treatment related information and violated the requirement of candor with the court. In the alternative, the attorney was equally frustrated because she was unable to determine the sanctions faced by her client if she disclosed the information to the court. After consulting with the client and mental health attorneys, the attorney decided to advise her client to

78. Meekins 1, *supra* note 34 at 91.

79. Meekins 2, *supra* note 68, at 38.

80. *See id.* at 37.

disclose the incident to the court. After the client agreed to the disclosure, the attorney attempted to mitigate the sanction imposed by the court by explaining that she advised her client to withhold the information. As the defense lawyer explained the arrest to the judge and advocated for leniency for her client, she was sharply cut off and told to “stop advocating” because “the court has heard enough from you and wants to hear from the defendant.” Is the presence of a defense attorney in court enough to ensure “prompt access” even when they are discouraged from adversarial advocacy? Does the MIOTRCA clause requiring prompt access to defense counsel protect a defendant’s Sixth Amendment right to counsel? Formal court rules can require mental health courts to guarantee protection from the Sixth Amendment.

V. MENTAL HEALTH COURTS SHOULD ADOPT STANDARDIZED
COURT RULES THAT GUARANTEE FIFTH AND SIXTH AMENDMENT
RIGHTS FOR ALL PARTICIPANTS

*A. Mental Health Courts Should Adopt the Pre-Adjudicatory
Model*

Designs for future and existing mental health courts should require standardized court rules that mandate the implementation of the pre-adjudicatory model to preserve a non-compliant defendant’s right to a negotiated plea or right to trial. A pre-adjudicatory mental health court suspends prosecution of criminal charges while the individual participates in court mandated treatment.⁸¹ Upon successful completion of the MHC treatment, the prosecutor dismisses underlying criminal charges.⁸² In a pre-adjudicatory MHC, participants who are non-compliant and subsequently ordered to return to traditional criminal court may negotiate a plea or demand a trial by jury.

81. Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illnesses*, 11 PSYCHOL. PUB. POL’Y & L. 570 (2005).

82. *See id.*

B. Mental Health Courts Should Maintain the Fifth Amendment Rights of the Accused by Granting Limited-Use Immunity for Participants.

While an MHC participant may assert their Fifth Amendment right to remain silent at any stage of the MHC proceedings, information obtained by the prosecutor during the participant's time in the program may be used against the person if the case is eventually removed to traditional criminal court. If a participant is granted statutory-use immunity, the prosecutor may not use a witness's compelled testimony against him in a subsequent criminal prosecution of that witness.⁸³ A statutory grant of use or derivative-use immunity would leave a witness, compelled to testify by the terms of his participation in MHC, in substantially the same position as if he had not testified."⁸⁴ Immunity grants are enforceable in accordance with the statutes that authorize the immunity.⁸⁵ Legislators should enact statutes permitting statutory immunity grants for all MHC participants to encourage open communications during proceedings and to ensure adequate protections of Fifth Amendment rights for participants.

C. Mental Health Courts Should Permit Sixth Amendment Right to Effective Assistance of Counsel for Sanctioned Participants

Nothing in the problem-solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the rights to: perform discovery; challenge evidence or findings; recommend alternative treatments; or recommend sanctions.⁸⁶ MHCs have embraced a "by any means necessary" approach that embodies the paternalistic notion that the court is best able to identify and meet the participant's best interests and needs.⁸⁷ Compromising the defender's ability to zealously represent his or her client puts the

83. Murphy v. Commonwealth, 672 S.E.2d 884 (Va. 2009).

84. Andover Data Serv. Inc. v. Statistical Tabulating Corp. 876 F.2d 1080 (1989).

85. People v. Briggs, 709 P.2d 911 (Colo. 1985).

86. *Ten Tenets of Fair and Effective Problem Solving Courts*, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, http://www.nlada.org/DMS/Documents/1019501190.93/document_info.

87. Meekins 1, *supra* note 34 at 111.

client's interests in grave jeopardy.⁸⁸ Sanctioned participants must advocate for themselves with little or no assistance from counsel. Sanctions that increasingly include restrictive means of confinement including jail, probation, or house arrest should trigger a participant's Sixth Amendment right to *effective* assistance of counsel.

VI. CONCLUSION

The recent expansion of mental health courts and overwhelming number of individuals with mental illness in the criminal justice system raises many concerns for criminal justice scholars and practitioners. The National Legal Aid and Defender Association found that although defense representation is an important part of the operation of mental health courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and on-going evaluation and monitoring of problem solving courts.⁸⁹ As a result, important voices for fairness and significant treatment resources are lost.⁹⁰ Mental health courts can adopt formal court rules that protect Fifth and Sixth Amendment rights of participants while embracing the principals of therapeutic jurisprudence.

88. *See id.*

89. *Ten Tenets*, *supra* note 86.

90. *See id.*

Problem-Solving Courts: An Annotated Bibliography

CHRISTINA A. ZAWISZA* AND SANDRA NEWCOMBE*

As the number of problem-solving courts in this country proliferate,¹ the scholarship regarding such courts bourgeons as well. This annotated bibliography serves three purposes: (1) it provides the reader with a starting point and ready reference guide for accessing the research on problem-solving courts generally; (2) it positions drug courts and mental health courts amid the broader array of existing problem-solving courts; and (3) it provides concrete examples of the operation of such courts. It, finally, supplements the footnote citations of the three new voices featured in this symposium edition.

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PROBLEM-SOLVING MOVEMENT: GENERAL

Mark Neal Aaronson, Thinking Like a Fox: Four Overlapping Domains of Good Lawyering, 9 *CLIN. L. REV.* 1 (2002).

This essay argues for a reframing of legal education to prepare students for the practice of law. Principally, the author

argues that the repetitive nature of the case method narrows students' frames of reference to legal issues alone, and that method should be countered-balanced with other aspects of lawyering. The article advocates for incorporating four overlapping domains within the legal curriculum: (a) role-conceptualization; (b) problem-solving; (c) decision-making; and (d) practical judgment.

The first domain the author describes is role-conceptualization, or a lawyer's self-understanding of his role as a lawyer. Role-conceptualization is important because it encompasses how obligations are perceived, how a lawyer relates to his clients, how assignments are defined, what actions are carried out, and how actions are promoted. The other three domains—problem-solving, decision-making, and practical judgment—are interwoven aspects of thinking about solutions. Good problem-solving approaches require a lawyer to question his assumptions, to utilize decision-making aids, and to reconsider alternatives before reaching a conclusion. According to Aaronson, decision-making aids and formulas emphasize the value of being organized and systematic in critical decision making, and the importance of remaining vigilant about developments in other disciplines. Under the decision-making domain, it is important for law students to be able to utilize formulaic methods and aggregate information to enhance the quality and reliability of decision-making. Practical judgment requires the application and tailoring of general knowledge to particular circumstances, involves a dialogic process of deliberation, requires the ability to be empathetic, and focuses on the just achievement of human ends. Practical judgment develops over time as the lawyer is exposed to a variety of problem situations and repetitive practice.

The author contends that legal education must be a mix of doctrinal courses, liberal arts courses, and live-client practice and skills training. The mix of these three strains is a central avenue for students to gain critical, foundational knowledge of the role as a problem-solver. Aaronson argues for increased focus on developing critical skills in students and students' abilities to deal with a variety of professional situations systematically and with intellectual flexibility. The four domains together comprise sound deliberation in the practice of law.

Mark Neal Aaronson & Stefan H. Krieger, Teaching Problem-Solving Lawyering: An Exchange of Ideas, 11 CLIN. L. REV. 485 (2005).

This article represents an exchange between Mark Neal Aaronson and Stefan H. Krieger on the clinical approach to teaching effective lawyering. Krieger argues that an overemphasis on problem-solving approaches to lawyering downplays the necessity of knowledge regarding legal doctrine. Krieger emphasizes the importance of students acquiring substantive legal knowledge. For Krieger, the central focus of a lawyer's enterprise is the knowledge base he has in his legal profession. Students must have a solid doctrinal basis before learning skills in the clinical setting. Krieger utilizes a teaching model that emphasizes forward reasoning, an inductive process in which the problem-solver draws inferences from known data using problem-solving scripts and schemas.

Aaronson, however, stresses the importance of a student's ability to think critically as a lawyer. According to Aaronson, a legal education cannot provide students with the opportunity to develop substantive legal expertise. Substantive legal expertise will develop over time during practice. Aaronson stresses backward reasoning in his teaching, which identifies objectives and then works backwards from those objectives to determine what course of action might be taken. Aaronson articulates a teaching model that embraces dialogue and self-reflection with a heavy reliance on cumulative experience learning. This teaching model emphasizes students' abilities to spot and weigh concerns and improve their competence in exercising practical judgment.

Greg Berman & Anne Gulick, Special Series: Problem-Solving Courts & Therapeutic Jurisprudence, Just the (Unwieldy, Hard to Gather, but Nonetheless Essential) Facts, Ma'am: What We Know & Don't Know About Problem-Solving Courts, 30 FORDHAM URB. L.J. 1027 (2003).

This article assesses what is known, and what remains to be understood, about problem-solving courts. The article makes assertions, based on the reviews of drug court studies by Steven Belenko and others. Findings show that drug courts are popular, serve a needy population, and that court mandated treatment programs have higher retention rates. Drug program graduates who

participate longer in drug court programs have better outcomes, and have lower rates of recidivism. Sanctions are crucial to the model's effectiveness and drug courts are less costly than traditional adjudication. The article further addresses questions remaining which regard the drug court system, such as the post-program effects on future drug use, employment, and family stability.

Based on evaluations of the Midtown Manhattan Community Court, the authors contend that community courts can change the outcome in cases, achieve a high compliance rate, reduce arrests of sex workers and unlicensed vendors, and transform community attitudes. Overall, the neighborhood survey of the Midtown Manhattan Community Court demonstrated that local respondents viewed the court favorably. The article points out the need for additional research on other community courts in order to make any final assessments.

Domestic Violence Courts were established to enhance the safety of victims. Evidence suggests that continuous court monitoring reduces recidivism more effectively than batterer intervention/reeducation programs. Research also suggests that orders of protection do not keep victims safer. The authors highlight research from a study in Toronto that shows that cooperative victims lead to prosecution of cases seven times more often than non-cooperative victims do.

The authors also address research on public perceptions of problem-solving courts and the need to develop a research agenda for these courts. The article contends that studying the components of problem-solving courts, long-term and post-program outcomes, other outcomes for program participants, speed of the administration of justice, net widening, and community impacts are all appropriate topics for a future research agenda.

Pamela M. Casey & David B. Rottman, Problem-Solving Courts: Models & Trends, 26 JUST. SYS. J. 35 (2005).

This article describes the 2004 Conference of Chief Justices and the Conference of State Court Administrators that reaffirmed the need to advance the study, evaluation, and integration of a problem-solving approach into the administration of justice. The article describes the four most prominent problem-solving courts (community, domestic violence, drug, and mental health courts) in terms of their origins, key practices, variety, and successes to date.

Community courts originated because trial courts were overburdened, and outreach programs failed to bridge the gap between the courts and the communities. The Midtown Manhattan Community Court formed in 1993 with a mission to forge a closer bond between criminal courts and the community. As of 2005, twenty cities had functioning community courts, and five additional cities had plans to open one. The authors next describe the components of community courts, as follows: (a) community service and other alternative sanctions; (b) an extensive planning process; (c) commitment to changing the lives of offenders; (d) commitment to the quality of life in the communities affected. Community courts, however, differ in their definitions of the communities, resources, types of cases, and offenders targeted.

Two community courts in particular have been heavily evaluated: Midtown Manhattan Community Court and Hennepin County Community Court. Some special issues relating to community courts include the use of treatment and services as sanctions, court commitment to macro-level change, criminalizing “the inconvenient and disorderly,” and vagueness of the definition of “community.”

The first Domestic Violence Court emerged in Dade County Miami in 1992. The Violence Against Women Act of 1994, along with the funding that was made available by the federal government, failed to address domestic violence concerns within traditional court models. Not until 2000 was funding for specific domestic violence courts made available, and as of 2005 more than 300 domestic violence courts existed. The authors identify some common practices and elements of domestic violence courts including : (a) specialized intake services; (b) integrated information services; (c) case screening; (d) collaboration with community partners; (e) child-friendly court processes; (f) on-going training for court staff; and (g) close monitoring of cases. The authors note, however, that there is much variation across courts regarding subject matter jurisdiction of the courts, inclusion of criminal or felony cases, and the inclusion of child custody, visitation, and child support cases. The article points out the comprehensive studies conducted on domestic violence courts in Newark, District of Columbia, Fort Lauderdale, Lexington, Miami, Minneapolis, San Diego, and Connecticut.

Drug courts were established in response to increased drug case filings in the 1980s and 1990s. By 2003, there were over

1,000 drug courts in operation in the United States with the goal of opening an additional 429. Some common practices of drug courts include integration of substance abuse treatment with justice system processing, ongoing judicial interaction with drug court participants, and partnerships with community-based organizations. There are variations, however, across courts, such as: who is responsible for screening, sources of funding, and the type and frequency of incentives to reward progress or address relapse.

The first official mental health court emerged in Broward County, Florida in 1997. In response to individuals with mental illness in the criminal justice system, Broward County and other jurisdictions diverted offenders with mental health issues into treatment rather than incarceration.

There is growing support for additional mental health court programs since the passage of America's Law Enforcement and Mental Health Project Act. Some common practices in mental health courts include voluntary participation, early intervention, emphasis on the therapeutic environment, client-centered treatment, and consideration of public safety issues. Similar to other problem-solving courts, mental health courts vary significantly.

The article concludes by identifying twelve trends that will impact the future of these courts: proliferation of problem-solving courts, stability, sustainability, evaluation, realistic expectations, increased information sharing, additional discourse on ethical and legal issues, cost savings, procedural fairness, tension over allocation of treatment and social services, public support, and the expansion of the problem-solving approach.

Susan Daicoff, Law as a Healing Profession: The "Comprehensive Law Movement," 6 PEPP. DISP. RESOL. L.J. 1 (2006).

This article describes the history, context, importance, and development of ten or so "vectors" of an emerging change in the law comprising the "comprehensive law movement." The comprehensive law movement is a movement towards law as a positive force in the resolution and administration of legal matters. The vectors that the author identifies include creative problem-solving, therapeutic jurisprudence, preventive law, restorative justice, collaborative law, transformative mediation, and holistic justice. The movement utilizes the insights of procedural justice

and other social science-based understandings of the intrapersonal and interpersonal dynamics of legal affairs. Developments such as problem-solving courts, which include drug treatment courts, unified family courts, and mental health courts, are examples of the comprehensive law movement's function.

The comprehensive law movement and its vectors intersect in two broad areas. First, they seek to optimize human well-being in the administration of law and the resolution of legal matters, when doing so does not reduce the legal rights of the individuals involved. Second, in resolving legal matters, each explicitly considers more than strict legal rights. Both areas include other non-legal factors in the analysis of legal problems and legal solutions.

According to Professor Susan Daicoff, law as a healing profession "has great transformational potential." The legal profession has been suffering from a "tripartite crisis" of "deprofessionalism, low public opinion of lawyers, and lawyer distress" and dissatisfaction. The comprehensive law movement has the potential to infuse a set of restorative, therapeutic, collaborative, and humanistic values into the legal process. These changes may greatly appeal to many lawyers and their clients. In offering an alternative to the traditional approach to law and lawyering, the comprehensive law movement may encourage lawyers to rediscover the values with which they entered law school. Legal education must equip students with the tools necessary for practicing comprehensive law. On the other hand, Professor Daicoff warns that the comprehensive law movement must not be oversold because clients must be allowed to determine the ultimate goals for their representation.

Symposium, Lawyering and its Discontent: Reclaiming Meaning in the Practice of Law (Susan Daicoff, The Comprehensive Law Movement), 19 Touro L. Rev. 825 (2004).

Professor Daicoff addresses dissatisfaction in the legal profession in conjunction with the comprehensive law movement. She encourages her audience to consider redefining success and the role of a lawyer beyond external rewards and encourages lawyers to look towards internal satisfaction. But discontent is not the only driving force in the comprehensive law movement; it is increasingly apparent that an emphasis on human growth and

development is propelling the movement. Professor Daicoff points out that the various comprehensive law “vectors” optimize human well-being and focus on extralegal concerns.

Professor Daicoff begins by describing the three layers of the comprehensive law movement: the way of looking at the practice of law (“lenses”), the processes used in resolving legal disputes, and the skills necessary to practice comprehensively. She identifies eight different “vectors” or disciplines that move towards the goal of optimizing human well-being: therapeutic jurisprudence, procedural justice, holistic justice, creative problem-solving, preventive law, collaborative law, restorative justice, and transformative mediation. Professor Daicoff also discusses the skills that are necessary to practice comprehensively: people skills, mindfulness meditation, empathy, active listening, open-ended questioning, basic psychological sophistication, and self-awareness.

Finally, Professor Daicoff describes how the skills, “vectors,” and the comprehensive law movement itself, create a novel blueprint for the future of the legal profession as whole. She looks forward to the transformation of the profession into an “exciting, invigorating, positive, therapeutic, curative, restorative, creative, and inspiring” practice. Professor Daicoff’s vision is for the legal profession to incorporate a human element into the legal profession and legal education “where the fabric of society is knit together by lawyers rather than rent.”

Russell Engler, And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 FORDHAM L. REV. 1987 (1999).

This article addresses the role that judges, mediators, and clerks play in meeting the needs of unrepresented litigants. Part I of this article examines the interactions of those groups with the unrepresented litigants. Professor Russell Engler explains that the legal system has established barriers that prevent unrepresented litigants from accessing legal advice. Rules generally prohibit clerks and mediators from giving legal advice to unrepresented litigants. Judges are highly driven by crowded dockets and have little incentive to use scarce judicial resources in order to educate unrepresented litigants. Yet, unrepresented litigants are presumed to be informed and rational actors. These barriers can be

devastating to unrepresented litigants, who unknowingly forfeit their rights throughout the litigation process.

The second part of this article presents proposals for revising the roles of court actors. The adversary system's goal is to provide fairness and justice. Because the traditional practices of the court frustrate that goal, the practices must change. The roles of judges, mediators, and clerks are interconnected and re-examination of those roles must be contextual.

The article examines three different legal fora that draw large numbers of unrepresented litigants: family, bankruptcy, and housing courts. According to Professor Engler, housing courts represent the "ultimate breakdown of the adversary system, with the typical case pitting represented landlords against unrepresented tenants." The article also examines the various official responses to housing court issues. The author examines the Boston Housing Court and the New York City Housing Courts. In each setting, failures of the court systems prevent the *pro se* litigant from obtaining justice. Housing courts can revise their rules and appoint counsel for unrepresented litigants or continue to maintain the status quo. In conclusion, the author asserts that the only way to achieve fairness for unrepresented litigants is for courts to redefine the rules to provide greater access to resources. Courts should not focus solely on streamlining dockets and disposing of cases quickly.

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

This article discusses a study conducted by the California Administrative Office of the Courts which examined a focus group of judges in California and New York. The study addresses the opportunities in and barriers to applying problem-solving court practices in mainstream courts. The article identifies problem-solving or "collaborative justice" courts as courts that have a "problem-solving focus, team approach to decision making, integration of social services, judicial supervision of the treatment process, direct interaction between defendants and the judge, community outreach, and a proactive role for the judge inside and outside the courtroom."

This article evaluates how states like California, New York, Missouri, Louisiana, and Ohio have begun incorporating some

aspects of problem-solving initiatives on a statewide level. The researchers investigated the feasibility of applying problem-solving court practices outside the specialized setting of discrete interventions (substance abuse, domestic violence, mental illness, etc). The specialized court research in California and New York identified the principles and practices that are most easily applied in conventional courts. The five most appropriate practices identified were: (a) a proactive judicial role; (b) direct interaction with the offender; (c) continuous judicial supervision; (d) coordinated social services; and (e) a team-based approach. Some barriers that the research identified were limited time and resources of the courts and conflicting judicial personalities. Lastly, the researchers noted one of the biggest struggles in incorporating a problem-solving model in the courts lies in convincing other judges to embrace it. In order to expand the problem-solving philosophy, the researchers suggest increased education and training, exposure through mentoring, experience through assignment and rotation, and encouragement through judicial leadership. Most judges who participated in the study expressed optimism about applying the problem-solving model to mainstream, conventional court assignments.

Judith S. Kaye, Delivering Justice Today: A Problem-Solving Approach, 22 YALE L. & POL'Y REV. 125 (2004).

This essay, written by the Chief Judge of the State of New York, explains how and why New York has adopted a problem-solving court model to address certain cases. The essay also addresses the effectiveness and fairness of applying the problem-solving approach. Judge Kaye posits that the underlying goal of problem-solving courts is dispensing effective justice. Therefore, when conventional case processing failed to address the repeated recycling of people through the court system, problem-solving initiatives had to emerge and help break that cycle. Judge Kaye identifies three characteristics of all good problem-solving courts: careful planning and preparation of all “stakeholders,” continuity in the courtroom and close judicial monitoring.

After the erosion in the quality of life due to drugs, crime, and domestic violence within the Midtown neighborhood of Manhattan, the first community court opened its door in 1993. This community court combines punishment with help during the sentencing process. The community service sentence takes place in

the community where the crime was committed, thus restoring the community that was injured. The Midtown Court has a variety of methods to engage the community in achieving its goals. This Court has received numerous accolades and recognition from other state court systems.

Recognizing that substance abuse drives much of the caseload in criminal courts, New York followed the Miami model and opened its first drug court in Rochester in 1995. The initial public reaction was often hostile and criticized New York for being “soft on crime.” However, the state has since spread the drug court model to over ninety-six courts. For an offender to be accepted into the drug court program, there must be a consensus between the judge, the prosecution, and the defense that the offender meets the necessary criteria which are a non-violent charge and a history of addiction. Once in treatment, the defendant is closely monitored by the court.

New York has also adopted family treatment courts to help substance-abusing parents. Judge Kaye shows the success of this program through the graduation rates of participants and judges’ evaluations of the effectiveness of these courts. The third example of New York’s problem-solving approach is the domestic violence courts. Recognizing that handling domestic violence cases requires special skills and training, New York established a Family Violence Task Force, which trained judges and court staff. Later, New York created a series of Integrated Domestic Violence (“IDV”) courts to hear all family cases involving domestic violence. The IDV created a unified family court and it has since been replicated statewide.

Although Judge Kaye determined that it is still too early to announce the definite success of the problem-solving approach, she offers five principal areas of improvement: reduced recidivism, improved street conditions, increased accountability, stronger families; and higher public confidence. Admittedly, gauging the fairness of problem-solving courts is a challenge because there are no concrete measuring tools. However, Judge Kaye suggests that providing a carefully planned assessment in a problem-solving court provides a better opportunity for prosecutors and defense; rather than a revolving door of “McJustice.” In conclusion, Judge Kaye states that the next step for the problem-solving approach is to incorporate this model into the broad administration of justice.

Katherine R. Kruse, Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation, 8 CLIN. L. REV. 405 (2002).

This article explores the challenges of adapting problem-solving techniques to individual client representation and the use of those techniques in community lawyering problem-solving contexts. The author utilizes the strategies of compartmentalization, connection, collaboration, and continuity to help students overcome these obstacles. Professor Kruse's successful work with students in a *pro se* prison service project creates a strong argument for developing larger problem-solving skills. She concludes that the practical experience students gain through working on real-life projects far outweighs the challenges of adapting problem-solving techniques in the classroom.

John Lande, Developing Better Lawyers & Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering, 2008 J. DISP. RESOL. 1 (2008).

Law schools continue to rely on the case-study method of instruction, which undoubtedly has valuable strengths, but leads students to overlook important aspects of the lawyering process. In recent decades, there have been innovations in lawyering, due to increasing clamor from lawyers and judges. These include: mediation and arbitration, collaborative law, and cooperative practice. The University of Missouri Center for the Study of Dispute Resolution and the Journal of Dispute Resolution held a symposium in 2008 to discuss these innovations..

Practitioners and scholars presented a variety of innovative models of lawyering, including collaborative law and other processes of problem-solving techniques. Professor David Hoffman presented an article addressing expanding dispute resolution services. Professor Hoffman suggested that dispute resolution encompasses the goals of efficient conflict resolution and helping people understand their values and priorities in connection with their disputes. Professor Nancy Welsh's article focused on the changing environment of legal education and the need to provide improved client services. She argues that law students and lawyers tend to resolve problems by legal analysis rather than by addressing the emotional or moral needs of the parties. Professor Welsh suggested that the business aspects of

legal practice are the driving force for this narrow reinforcing orientation. Professor Julie Macfarlane sympathized with the concerns of Professor Welsh, but she also recognized a new concept of advocacy which she termed “conflict resolution advocacy.” Conflict resolution advocacy involves a closer relationship between the client and the attorney—one in which clients drive decision-making.

The symposium contributors agreed that there is value in innovative lawyering, but they pointed out that there are difficulties in disseminating new practices. Professor Lande praised symposium presenters for suggesting useful practices to help lawyers grapple with dispute resolution issues.

*John Lande, The Promise and Perils of Collaborative Law, 12
DISP. RESOL. MAG. 29 (2005).*

This article addresses the benefits and risks of collaborative law in the dispute resolution process. According to Professor Lande, collaborative law (CL) is an innovation in legal practice that focuses on client interests in the processes of negotiation and settlement. This movement began in the 1990s, and by 2005 included over 150 CL practices nationwide. CL rejects the traditional adversarial process, instead favoring negotiation methods. In a CL practice, parties and their lawyers sign a participation agreement that focuses exclusively on negotiation, full disclosure of information, and an interest-based approach. In addition, these agreements create strong incentives for all parties to negotiate within the CL context, because CL agreements disqualify lawyers from representing a party in litigation. Early CL cases have primarily dealt with family law matters. While there are many laudable attributes of CL, Lande addresses the potential perils of CL. Such perils include: (a) parties may be confronted with unrealistic expectations; (b) excessive settlement pressure; (c) violation of rules of professional conduct; and (d) resistance to options and innovations. Professor Lande is hopeful that as CL expands it will produce benefits and minimize the risks in this dispute resolution model.

Alan M. Lerner, Law & Lawyering in the Work Place: Building Better Lawyers by Teaching Students to Exercise Critical Judgment as Creative Problem Solver, 32 AKRON L. REV. 107 (1999).

This article argues that a legal education dedicated to analyzing court opinions hinders the development of problem-solving skills and the exercise of critical judgment, both of which are crucial components of effective lawyering. To develop critical judgment, lawyers must analyze the law critically, question the theory upon which it rests, and challenge the application of the law to the facts. Lawyers also need to gather and synthesize information from a variety of sources, while appreciating that each source has its own perspective. In an increasingly complex legal environment, lawyers must engage in complex discussions of the law's relationship to contentious issues. Thus, effective communication is critical to the work of an effective lawyer.

Professor Lerner argues that the way to produce better lawyers is by teaching law students to think critically, act creatively, and exercise critical judgment. To accomplish this goal, Professor Lerner developed a first-year elective clinical course centered on employment discrimination law. Professor Lerner's clinical model allows students to critically examine and apply principles of employment discrimination law, understand the importance of context, become actively engaged in defining context, experience the role of a lawyer as a problem-solver, and obtain feedback about their roles as a problem-solvers. Through this clinical course, Professor Lerner demonstrated that students came to understand that various non-adversarial skills are required in order to become an effective, competent lawyer. After completing the course, students acknowledged the lawyer's role in defining context and the importance of considering interests other than their own client's if they hoped to resolve problems constructively. The majority of students demonstrated an appreciation for a broader definition of a lawyer's role as an effective problem-solver.

Lela Porter Love, Twenty-Five Years Later with Promises to Keep: Legal Education in Dispute Resolution and Training of Mediators, 17 OHIO ST. J. ON DISP. RESOL. 597 (2002).

This article reflects on the inclusion of dispute resolution and mediation training in legal education and reviews advances made in the field of alternative dispute resolution. Law schools now offer courses in dispute resolution theory and skills, as well as certificate programs, master's degrees, and CLE programs for alternative dispute resolution. Professor Love asserts that the interactive pedagogy used to teach dispute resolution "has infused new life into law school teaching." The therapeutic jurisprudence and preventive law movements have brought to law schools interdisciplinary research and teaching that complement the foundations of mediation theory. Professor Love discusses the collaborative law movement and explains that the American Bar Association's ("ABA") Section of Dispute Resolution Conference now offers a negotiation and mediation competition along with the ABA's traditional litigation-based competitions. As mediation has gained more public acceptance, training for mediation practitioners has gained more attention. Structured training requirements, certification for trainers, and continuing mediation education are now required for mediation practitioners. Professor Love warns instructors and practitioners against inserting adversarial values into the mediation training process. Going forward, training for mediation practitioners should be specialized and accessible. Professor Love also argues that more research is needed with regard to the dynamics of power and ways to combat gender, culture, or disability implications in mediation.

Linda Morton, Teaching Creative Problem Solving: A Paradigmatic Approach, 34 CAL. W. L. REV. 375 (1998).

This article argues for broad-based problem-solving instruction in legal education that centers on humanitarian impulses, , critical thinking, self-reflection, and prevention of problems. The author argues for "creative problem-solving training" because it fosters a deeper comprehension of the existing or potential problems of clients. According to Professor Morton, creative problem-solving has "six facets which differentiate it from the more narrow approaches to problem-solving." First, creative problem-solving focuses on the needs and interests of both

individuals and society. Second, it requires an analysis of those values. The third facet requires the continual exploration of other disciplines and resources that utilize problem-solving methods. Fourth, creativity is encouraged in decision-making so that clients and lawyers are willing to take risks and learn through error. Fifth, creative problem-solving emphasizes prediction and prevention of problems. The final facet requires self-reflection and analysis.

Morton concludes that teaching problem-solving to students offers them a broader perspective on the roles attorneys play and thus results in a more humanistic approach to the law. Finally, she argues that law faculty can incorporate creative problem-solving methods in doctrinal as well as clinical courses. Morton calls for more research on the benefits and methods of teaching creative problem-solving in the legal education.

Forrest S. Mosten, Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court, 43 FAM. L.Q. 489 (2009).

This article advocates lawyers moving away from the traditional adversarial model and embracing the comprehensive law movement in order to advance peacemaking goals and strategies in family law practice. Morton contends that a peacemaker is “one who makes peace, especially by reconciling parties in conflict.” However, the core values that a lawyer brings to his work as a family lawyer define whether he is a peacemaker. According to Professor Mosten, values of peacemakers include compassion, suspension of judgment, “mindfulness,” forgiveness, humbleness, and acceptance.

Therapeutic justice, holistic lawyering, and restorative justice are three different models of the comprehensive law movement that many lawyers have already incorporated into their practice as peacemakers. Professor Mosten argues that family lawyers can integrate common aspects of peacemaking into their practice, including: negotiation and problem-solving, the reduction or elimination of threats and blame, a commitment to comprehensive resolution, and the adoption of peace and harmony. He labels as “peacemaking services” the following typical tasks of the lawyer: client advisor, litigator, mediator, mediation representative, unbundled coach for *pro se* parties, collaborative lawyer, preventive lawyer, and conflict wellness provider. The first step for a peacemaker is to obtain the informed consent of the

client about the specific process that will be used. Informed consent should be sought as early in the relationship as possible and should include a detailed discussion of the roles the lawyer may play and other choices available to the client.

According to Professor Mosten, peacemaking and litigation are compatible. Litigators who embrace a peacemaking approach can make a positive difference in the lives of their clients. On an individual basis, the lawyer can set a peacemaking tone in many ways. She can readily agree to requests by the other party to stipulate facts, admit evidence, or speed up proceedings; she can readily agree to requests for personal accommodations for continuances based on illnesses, children's needs, work responsibilities, and other reasons; she can refrain from taking advantage of mistakes by opposing parties; and she can refrain from negative, personal, or sarcastic comments. Finally, a peacemaking lawyer can at all times advocate for family healing and demonstrate that such an approach is congruent with the interests of the client.

Mosten contends that, today, mediation has become an integral part of family law practice. Mosten further argues that a peacemaking approach can increase client satisfaction. Because it takes into account the long-term needs of a family, the peacemaking approach can prevent future conflicts. The author concludes with the following recommendations: (a) continuing education for family lawyers should include peacemaking; (b) courts should incorporate peacemaking into decision-making; (c) private and public law practices should be built around peacemaking; and (d) incentives should be developed for lawyers to teach peaceful client empowerment.

Stephen Nathanson, Legal Education: Designing the Problems to Teach Legal Problem Solving, 34 CAL. W. L. REV. 325 (1998).

This article argues for a problem-centered legal curriculum providing factual material for law students to simulate actual legal practice. If the end goal of a legal education is to develop analytical thinkers and problem-solvers, then the curriculum should reflect that goal throughout the three years of study. According to Professor Nathanson, a problem-solving curriculum engages students in working on real-life or simulated problems. Teachers operate as facilitators who guide students throughout the process and focus on promoting student-driven learning. Educators

may choose different methods to teach problem-solving—skills, “case study method,” or problem-based learning—but they share the underlying goal to teach through student involvement with problems.

The author suggests that there are six characteristics of effective “teaching” problems. The problems should be “user friendly,” realistic, relevant, consistent with objectives, similar, but different, and challenging. User friendly problems are easy to read and well organized, with consistent use of facts and figures. Realistic problems integrate current, realistic objectives and facts. The relevancy requirement focuses on commonality in practice and high impact. The problem generated should be consistent with the objectives and use appropriate context and format. Problems should promote transferability of concepts from one scenario to another. Lastly, problems should be challenging. Professor Nathanson contends that no amount of good teaching will overcome a poorly designed problem because the only way a student learns is by working through the problem. Therefore, in a problem-centered curriculum, the quality of the problem is essential. The author concludes with an example problem, incorporating his suggested characteristics.

Andrea M. Seielstad, Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education, 8 CLIN. L. REV. 445 (2002).

Professor Seielstad argues that the legal education within the creative problem-solving context is enhanced when students work with poor communities and engage in community building. She describes the University of Dayton Law School’s clinic involvement in community groups that utilized broad-based problem-solving training to address conditions affecting the health, safety, and use and enjoyment of an inner-city neighborhood.

In this article, Professor Seielstad contends that a law school curriculum can incorporate problem-solving instruction through experiential learning. Building on Professor Linda Morton’s definition, Professor Seielstad asserts that creative problem solving is a “complex, multi-faceted and ambiguously-structured manifestation of problem-solving, a process that requires technical expertise, creative artistry, and empathy.” She proposes a model for teaching creative problem-solving skills

through collaborations with organized grassroots community groups and multidisciplinary service providers.

Professor Seielstad identifies three foundational elements for implementing a successful teaching model: community building activities that present complex social and ethical issues; incorporation of individual representation and community representation; and management of communication and collaboration with diverse individuals and interests. Clinicians must be proactive in connecting with communities and building community support to develop a successful collaboration. Through observations, interactions, and student involvement in group problem-solving, law students develop skills and cognitive abilities that translate to a wide variety of aspects of client problem-solving.

*Charity Scott, Doctors as Advocates, Lawyers as Healers, 29
HAMLINE J. PUB. L. & POL 'Y 331 (2008).*

This essay explores some counterintuitive concepts and investigates how they may contribute to our understanding of the role of doctors and lawyers in health care conflict resolution. The essay defines a fiduciary as “someone who is required to act for the benefit of another person and who owes to the other person the duties of good faith, trust, confidence, and candor on all matters within the scope of their relationship.” It then discusses how taking this fiduciary concept seriously may unravel part of the conventional view of doctors as healers and lawyers as advocates. The author describes both the physician and attorney as fiduciaries because they each form client relationships based on trust and coupled with the obligation to place patients’ (or clients’) welfare above their self-interests. Therefore, the fiduciary relationship of doctors gives rise to their duty, not only to heal, but also to advocate on behalf of their patients. The author maintains that as long as doctors claim their professional responsibility over commercial relationships, they will maintain their patients’ trust.

On the other hand, lawyers can also act as healers. The role of the lawyer has evolved into that of the client’s problem-solver, peacemaker, and consensus builder. Along with new concepts of lawyering, new ways of practicing law have emerged—preventive law, collaborative law, and therapeutic jurisprudence. Professor Scott credits Professor Daicoff’s comprehensive law movement for these new approaches. Finally, this essay explores whether viewing doctors as advocates and lawyers as healers, acting according to

the professional and ethical responsibilities of each profession, will increase effective conflict resolution in health care. Professor Scott concludes optimistically, stating that doctors acting as advocates, promoting patients first, and lawyers serving as healers, remaining open-minded about clients' best interests, may help manage and resolve traditional conflicts in the culture of health care.

Janet Weinstein & Linda Morton, Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education, 9 CLIN. L. REV. 835 (2003).

This article centers on the importance of creative thinking in the legal education. Weinstein and Morton address the difficulties of engaging in creative thinking and discuss methods involving the creation of a more conducive learning environment. They contend that creative thinking is a critical skill needed for law students to become effective in their future role as problem-solvers.

Part I of the article defines creative thinking and discusses how everyone is capable of engaging in it. The authors present several definitions and ways of conceptualizing creative thinking, but all recognize that creative thinking is a dynamic process not solely determined by genetics. Based on the various definitions, the authors argue that creative thinking is a skill available to anyone with the motivation to develop it, but that it is underutilized in legal education.

Part II provides a framework for understanding what exactly occurs in the brain that allows creative thinking. In their discussion, the authors focus on cognitive theory and hemispheric specialization. Cognitive theory suggests that the creative process is learned through life experiences. The authors contend that the dialectic approach of law school education closely resembles this generativity theory.

Hemispheric specialization, however, is rooted in right-left brain theory. The right hemisphere excels at puzzles, designs, music, recognizing faces, analyzing people's tone or facial expressions, and other activities requiring spatial relations or creative thinking. The left hemisphere is involved with language and sequential processing. In the legal field, the left hemisphere is particularly dominant as law students study language and sequence. Special effort is required of law students to allow equal attention to the right hemisphere's work of dealing with new

situations. Weinstein and Mortons argue that hemispheric specialization is useful in analyzing the functions employed in problem-solving in the legal context—as no activity is solely right- or left-hemisphere oriented. Creative thinking requires one to nourish the right brain and develop new connections.

Part III and Part IV discuss techniques for encouraging creative thinking. Weinstein and Morton describe techniques that encourage the collaboration of both hemispheres of the brain. These include: wordplay, “six hats,” word association games, visualization, and relaxation. They also identify internal and external factors that stimulate creative thinking. The article notes that genetic inheritance and individual experience contribute to internal factors of thinking style and personality type. External factors focus on what is happening outside of the individual including knowledge, environment, and circumstance.

The article’s conclusion recommends, first, that professors incorporate creative thinking in their scholarship and teaching methodologies. Weinstein and Morton encourage the use of fiction or narrative in teaching, consultation with other disciplines, or the diversification of teaching methods to incorporate different learning styles. They also propose decreasing the emphasis on grades, increasing faculty diversity, encouraging interdisciplinary work, working in the community, and utilizing new teaching tools in the classrooms. In conclusion, Weinstein and Morton urge that legal educators should expand the methods used in training students to think creatively.

Bruce J. Winick, Therapeutic Jurisprudence and Problem-Solving Courts, 30 FORDHAM URB. L.J. 1055 (2002).

Professor Winick advocates the development of problem-solving courts, particularly drug, mental health, and domestic violence courts. He urges that these courts be characterized by active judicial involvement and use of judicial authority to motivate individuals to accept services and monitor compliance by litigants. Such courts are not as concerned with processing the court case, as they are in reaching tangible outcomes that reduce recidivism. Problem-solving courts educate the community about the problem in question, and the resources required to resolve it. They become advocates for the individuals they work with and for the allocation of additional community funds to resolve their problems. These courts apply a public health approach to social

and behavioral problems by targeting recurring problems of behavioral, psychological, or psychiatric difficulties, and intervening to prevent reoccurrence.

Professor Winick uses therapeutic jurisprudence as a theoretical framework for the development of problem-solving courts. Therapeutic jurisprudence emerged in the 1980s in mental health law as a way to increase law's therapeutic impact. It uses insights from psychology and behavioral sciences to review legal and judicial practices. Therapeutic jurisprudence addresses how legal and judicial practices can be redefined in order to increase therapeutic impact and avoid psychological harm.

Problem-solving courts use therapeutic jurisprudence to enhance their effectiveness, including, "integration of treatment services [. . .] ongoing judicial intervention, close monitoring of an immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations." Drug treatment, domestic violence, and mental health courts all take therapeutic approaches to processing cases and using legal processes to accomplish the goal of rehabilitation.

Professor Winick also discusses how therapeutic jurisprudence can provide direction for problem-solving court judges who rehabilitate offenders, provide access to services, and monitor and supervise the treatment process. He suggests that judges can individualize and improve this process by improving their interpersonal skills, avoiding paternalism, respecting the autonomy of the individuals, and using persuasion to motivate individuals to accept treatment.

To increase the compliance of litigants with court orders, judges can model: health care compliance principles, "behavioral contracting," or psychology of procedural justice. To increase patient compliance, health care professionals provide the patient with undivided attention, allow the individual to talk and ask questions, and generally treat the individual with respect. Under behavioral contracting, the parties enter into a formal contract in which specific goals are articulated. This method is a successful way to encourage litigant compliance because explicit expectations are set from the beginning. Studies of the psychology of the procedural justice method show that when litigants are treated with dignity and respect, given a voice, and feel validated, they report greater satisfaction and more willingly comply with judicial orders. Thus, if individuals perceive that they are included in the judicial

process, it is much more likely that they will genuinely engage in treatment programs.

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

This symposium article discusses the creation of the four problem-solving courts in New York: Rolando Acosta, Harlem Community Court; Anne Swern, District Attorney's Office for Kings County; Lias Schreibersdorf, Brooklyn Defenders Services; and Gloria Sosa-Lintner, New York County Family Court.

Harlem Community Justice Center

The Harlem Community Justice Center is a problem-solving court that handles landlord-tenant, juvenile delinquency, and parole reentry proceedings for communities in East and Central Harlem. The Harlem Community Justice Center opened in May of 2001, after years of planning. The panel of contributors acknowledged that the funding commitment from the federal Empowerment Zone and other private sources, along with the preliminary planning, were very important. The planning team understood that the success of the Justice Center was dependent on the involvement of the community in which it would be located. Therefore, the planning team sought out and obtained input from community stakeholders in Harlem. The Justice Center is actively addressing youth crime, drugs, and adequate housing, all of which are problems that have continually plagued these neighborhoods.

The Justice Center has also established a Juvenile Intervention Court and a Youth Court to reach out to the youth population in the communities. The Juvenile Intervention Court hears cases involving neighborhood juveniles who have been arrested for non-violent offenses. The Youth Court is a teen-run court that encourages young people to take responsibility for their actions and recognize how their behavior affects the community.

The other major component of the Justice Center is the Housing Court, which deals with landlord-tenant proceedings in Harlem zip codes. The Housing Court seeks to improve the stability and health of these Harlem communities. The Court links tenants to service providers and public benefit programs and helps to ensure that landlords receive rent owed. The Court also monitors

compliance with building code violations and other habitability requirements.

Kings County Problem-Solving Courts

The Office of the District Attorney for Kings County has been committed to alternative sentencing and problem-solving since 1989. The goal of the DA's office is to prevent crime and improve public safety. In Kings County, many prosecutorial programs are run side-by-side and they complement problem-solving courts in Brooklyn. As of the date of this symposium, the county planned to open additional problem-solving courts, including the first Mental Health Court in New York and a Misdemeanor Drug Court. However, in 1990 the District Attorney started the Drug Treatment Alternative to Prison Program (DTAP) which targeted certain felony related drug offenders for participation in alternative sentencing. The DTAP program has produced cost-savings of approximately \$22 million and reports lowered recidivism rates for its graduates. Based on these results, the Office of Court Administration launched the Brooklyn Treatment Court in 1996. This problem-solving court demonstrates that alternative sentencing is an effective method of justice for drug related cases. According to the DA's office, Brooklyn offers a climate of partnership and cooperation that allowed the birth of a problem-solving court.

The Brooklyn Defender Services credits the success of problem-solving courts in Brooklyn to community collaboration. The defense attorneys want to promote the success of their clients and the courts recognize that relapse does not necessarily equate to failure. In the Mental Health and Treatment Court, it is stressed that treatment plans are legitimate and tailored to individual needs of clients. Defender Services contends that the defense attorney's role in the problem-solving courts is to speak for the client, to ensure that the client's position is heard by the court, and ultimately, to help resolve the underlying problem of mental health or drug abuse.

Family Treatment Court

According to Family Court Judge Sosa-Lintner, the New York County Family Court deals with unique issues related to the

constitutional right to raise one's children. The Family Court struggled with delays, lack of information, and lack of services when it decided to start a Treatment Court. The Family Treatment Court targets parents charged with neglect or drug addiction. The Treatment Court does not accept cases involving allegations of abuse, or where the neglect involves mental illness. One of the basic requirements for both the Family Treatment Court and Family Court is that the judge receives an admission of neglect based on drug-use, within a week. Judge Sosa-Lintner lauds the ability to address the litigant directly in treatment courts as an empowering tool for the respondent.

Problem-Solving Courts: Center for Court Innovation, NATIONAL CENTER FOR COURT INNOVATION available at <http://www.courtinnovation.org> (last visited Aug. 12, 2012).

The National Center for Court Innovation is an organization providing research and development strategies to aid victims in the justice system, reduce crime, improve quality of neighborhoods, and increase public trust in the justice system. The Center for Court Innovation provides expert assistance to criminal justice professionals, judges, attorneys, and community organizations. The Center grew out of the Midtown Community Court, which dealt with low-level offenders around New York City's Times Square area. It has created community initiatives in New York City that address issues with drugs, domestic violence, juvenile delinquency, and neighborhood turmoil.

SPECIALTY COURTS

Drug Courts

Peggy Fulton Hora et al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America, 74 NOTRE DAME L. REV. 439 (1999).

This article offers the perspectives of judges and practitioners on the association between therapeutic jurisprudence and the emergence of Drug Treatment Courts. The writers argue that Drug Treatment Courts ("DTC") effectively, but unknowingly, apply the principles of therapeutic jurisprudence in solving the problems of drug and alcohol dependent defendants.

Part II of the article provides an explanation of therapeutic jurisprudence and discusses its origins. Professors Wexler and Winick cofounded the therapeutic jurisprudence concept in an article that noted that mental health law had developed on the premise of constitutional protections of the personal rights of patients.² They described this new perspective as an approach in which substantive rules, procedures, and roles of legal actors produce therapeutic or anti-therapeutic consequences for litigants. Professor Slobogin later redefined therapeutic jurisprudence as “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.” Therapeutic jurisprudence has been applied to many areas other than mental health, including corrections, domestic violence, health care, tort reform, contracts, and the criminal court system. Recently, it has branched out to areas of homelessness, preventative law, comparative law, international law, and family law.

Part III examines the DTC movement in depth, analyzing the societal, law enforcement, and legal problems that spurred the DTC movement. Although much has been written on therapeutic jurisprudence, the article argues that the DTC movement represents the first application of therapeutic jurisprudence to law and legal procedures. By introducing drug treatment principles to criminal defendants, juveniles, and family court participants, the DTCs unknowingly apply the concept of therapeutic jurisprudence.

DTCs are an outgrowth of the judicial frustration with the repeat cycle and explosion in the number of drug offenders in the criminal courts during the 1980s. Judge Hora acknowledged that criminal courts are recognizing that traditional criminal justice methods of punishment had not reduced drug-related crime, and are now looking for some method to cure the underlying problem of drug crimes. DTCs combined the traditional processes used in the criminal justice system with processes used in the drug treatment community, thereby creating judicially authorized treatment solutions for a class of drug offenders. The article notes that most DTCs integrate essential elements, including immediate intervention, non-adversarial adjudication processes, a hands-on

2. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et. al. eds., 2000) at 45.

judiciary, clearly defined and structured treatment programs, and a DTC that functions as a team.

DTCs required judges, prosecutors, and defense counsel to shift their orientation from their traditional roles in the criminal justice system and instead view the process as therapeutic and treatment-oriented. Shifting to a therapeutic approach, DTCs utilize a form of “smart punishment,” or a minimal amount of punishment, to achieve the twin goals of reducing crime and reducing drug use. DTCs still function within the structure of the criminal justice system, but according to the authors, they should be viewed as new and integral parts of the traditional system. Although overlapping jurisdiction exists, DTCs should only handle cases involving offenders needing drug treatment. DTCs may operate as a single entity or as “a unified drug court” that adjudicates and monitors all cases screened for drug treatment. These courts recognize the immediate need for treatment and quickly place offenders before a judge and a DTC team. In DTCs, “the treatment experience begins in the courtroom.”

The authors describe the operations of five DTCs: (1) Miami Drug Court; (2) Maryland’s Substance Abuse Treatment and Education Program (S.T.E.P.) and Drug Treatment Court; (3) Oakland, California’s Diversion Drug Court; (4) Kalamazoo, Michigan’s Substance Abuse Diversion Program for Female Offenders; and (5) Escambia County, Florida’s Juvenile Drug Court Treatment Program.

Miami Dade County, Florida’s Drug Court

The first of its kind in the country, the Miami Drug Court opened in 1989. Its goal was to confront the overwhelming number of drug offenders in the Dade County court system. To participate in the program, defendants must be charged with possessing or purchasing drugs and the State Attorney must agree to divert the defendant. The treatment program has three phases. Phase I, or the detoxification stage, focuses on ending physical dependency and usually lasts twelve to fourteen days, but the duration may vary depending on the defendant’s progress. Phase II, called stabilization, starts when the judge believes the defendant has demonstrated enough progress to function outside a rigid treatment atmosphere. In this phase, the defendant may choose her treatment plan so long as her urine tests remain clean. In Phase III, the after-

care stage, the focus of treatment shifts to academic and occupational training for a new drug-free lifestyle. Upon successful completion of the program, the defendant appears one final time for the judge to discharge the defendant. The prosecutor then dismisses the charges. The court will seal the arrest record if the client is not rearrested within twelve months of program completion and has paid the program fee. Miami's Drug Court reported recidivism rates as 9.7% arrested within twelve months of graduation; 13.2% after eighteen months; and 24% five years post-graduation.

Maryland's Substance Abuse Treatment and Education Program (S.T.E.P.) and Drug Treatment Court

Baltimore's DTC, S.T.E.P. program, started in 1994 and now operates in district and circuit court. All levels of entry offer access to the same treatment program. Like other DTC programs, S.T.E.P. only accepts offenders who meet one of four referral eligibility requirements and pass the State's Attorney Office team screening. Once the referral process is complete, the defendant enters treatment through one of three tracks. The three track process is unique to Baltimore and consists of a Probation track, a Probation before Judgment track, and a Violation of Probation track. Once the DTC has the case, the DTC judge sentences the defendant, places her on probation, and requires execution of the S.T.E.P. contract. The program requires the defendant to attend Narcotics Anonymous, see his provider five days a week, report to a case manager twice weekly, provide urine samples twice a week, and appear in court at least twice a month for progress reports. Like other DTCs, the defendant goes through various stages of outpatient treatment. The S.T.E.P. program accepts individuals with substance abuse problems and major psychiatric disorders. The Baltimore Court reports success rates in line with the Miami's Drug Court's rates.

Oakland, California's Diversion Drug Court

Oakland's Fast Intensive Report, Supervision, and Treatment (F.I.R.S.T.) Diversion began in 1991. F.I.R.S.T. uses a system of contract-based tasks and incentives to encourage drug offenders to fully complete the program. Phase I includes

statutorily mandated diversion for eligible defendants. Phase II involves a ten-week supervision and evaluation period that requires the defendant to complete twenty-two tasks in the Diversion Contract. In this phase, incentives include up to a nine-month reduction in the program and a \$100 reduction in fees. Phase III involves a final supervision and treatment period over a three months. This phase requires the completion of 24 different tasks. The Alameda County Probation department plays a huge role in the success of this diversion program. F.I.R.S.T.'s participation, retention, and recidivism rates mirror those of other DTCs.

*Kalamazoo, Michigan's Substance Abuse Diversion Program
(S.A.D.P.) for Female Offenders*

Initially this program targeted non-violent male and female offenders; however, Kalamazoo's diversion program began to focus exclusively on female offenders in order to make the workload manageable. S.A.D.P. grew out Michigan's attempt to curb jail and prison overcrowding. The program targets substance-abusing women charged with non-violent felonies, and women who are facing probation violations stemming from substance abuse. In Phase I, Offenders are required to participate in substance abuse treatment and twelve-step programs, submit to regular drug testing, and attend biweekly DTC sessions. In Phase II, participants must report monthly to the coordinator, submit random urine tests for at least one year, and continue counseling and twelve-step programs. Participants who relapse must return to Phase I, but those who repeatedly fail program conditions may be terminated from the program. If discharged due to a lack of success, the offender returns to the traditional prosecution track. As of July 1998, only 10% of graduates had been arrested on new offenses.

*Escambia County, Florida's Juvenile Drug Court Treatment
Program*

Escambia's Juvenile Drug Court (JDC) started in 1996 with a grant from the Department of Justice. The scope of the grant initially provided for the treatment of forty juvenile offenders. The program utilizes a twelve-month treatment plan with a three-phase approach to juvenile substance abuse. Escambia's program also provides skills training, education, and spiritual guidance. Unique

to this program is its emphasis on the family and social issues that underlie juvenile substance abuse. The JDC employs a family intervention specialist to improve the juvenile's home environment and provide the family with skills to combat problems associated with juvenile offenders. Phase I of the treatment program focuses on therapy, drug testing, court hearings, and abstinence from all mood-altering substances. Phase II continues with therapy, drug testing, and court hearings. The final phase reduces therapy sessions but continues drug testing and court hearings. The Juvenile Drug Court provides early intervention and an alternative to jail for juvenile offenders who have a low risk of committing a violent offense.

The article highlights the achievements of the drug treatment courts and discusses some of the problems and concerns confronting them. Noted accomplishments of drug treatment courts across the country include success in retaining participants in treatment, reducing recidivism rates, and saving court resources. However, there are key concerns for the future success of drug treatment courts, such as comprehensive planning, eligibility requirements, length of treatment programs, frequency of hearings, monitoring of participants, types of treatment made available, protection of client's rights, tensions between courts and treatment providers, and handling relapse and recycling of participants. The underlying issue with the above concerns is obtaining government funds to start new drug treatment courts.

The authors address questions regarding whether the drug treatment court's reported reductions in recidivism are true indicators of reduction because the methods used do not rely on true scientific experimentation. They conclude that increased treatment participation does not translate to a substantial reduction in drug use or recidivism, but has not worsened those outcomes either. More long-term scientific studies are needed to determine true recidivism rates. However, they argue, treatment is the most effective and least costly method of reducing drug-related crime and it offers the public a safer environment than the traditional criminal adjudication process. In addition, the authors identify the potential for the therapeutic jurisprudence and the drug treatment court movements to further influence and enhance one another. The article advocates for a reevaluation of the criminal justice system's response to drug related crimes and substance abuse, and

encourages the development of more drug treatment courts to battle these issues.

Alex Kreit, The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?, 2010 U.CHI. LEGAL F. 299 (2010).

This article argues that states should adopt a drug program that removes drug users from the criminal justice system into a civil drug court system. Professor Kreit recognizes that drug courts are a better alternative than the status quo approach to the “war on drugs,” because they offer a less expensive method and a more humane approach to address the problem of substance abuse. His article compares the criminal drug court to an alternative civil court drug court system.

In an overview the author notes that the punitive drug policies have exploded corrections budgets and prison populations over the thirty years. In addition, there are collateral costs of criminalizing drug policy such as removing individuals from the labor market, trust issues between communities and law enforcement, and broken families. Therefore, there is a cost saving and better outcomes when drug-control resources are shifted toward treatment.

Professor Kreit next discusses the limitations of the criminal drug courts and presents other possible alternatives. Research indicates that a disproportionate amount of white drug offenders gain admission into drug treatment courts, while people of color and indigent offenders receive sanctions. In addition, drug courts are over-inclusive because individuals without drug abuse or addiction problems often receive treatment that they do not need. The article argues that drug treatment options are undermined by individuals who feign addiction to avoid incarceration.

The writer proposes the adoption of Portugal’s drug decriminalization law to remedy the inefficiencies of the criminal drug court. Portugal’s 2001 initiative removes all criminal penalties for drug possession and use in personal amounts, but that country maintains that the sale of drugs is illegal. Through the decriminalization process, law enforcement officers in Portugal issue citations in lieu of arrests for persons in possession of drugs. Those individuals are then required to appear before a “dissuasion” panel within seventy-two hours of the citation. The dissuasion panel is structured as a non adversarial tribunal made up of three

individuals, typically a medical professional, a social worker, and an attorney. The process focuses on the health of the individual. If the panel decides that the individual is a nonaddicted consumer of drugs with no prior citations, then the law requires that it suspend the proceedings and impose no sanctions. Eighty percent of the cases before the panel are dismissed in this manner. The panel has a wide-range of options for offenders who do not fit in the above category. The panel is able to impose fines, require treatment, or ban the individual from certain places. The rationale for the decriminalization method is to treat drug supply and demand as distinct problems, while addicts are viewed purely as medical and public health problems. The article concludes that the best way to treat drug addiction is to consider it a public health problem and to decriminalize drug use and addiction.

James L Nolan, Jr, Commentary, Redefining Criminal Courts: Problem-Solving & the Meaning of Justice, 40 AM. CRIM. L. REV. 1541 (2003).

This article considers the problem-solving courts movement as one of the innovations rectifying the ailments of the criminal justice system. The article focuses in particular on drug courts. It also analyzes some of the underlying theories, cultural affinities, and unintended consequences of the problem-solving courts in the criminal justice system in United States. Professor Nolan asserts that therapeutic jurisprudence is pervasive in the criminal justice system because of therapeutic sensibilities embedded in American culture. Therefore, cultural assumptions about therapy have influenced the changing practice and development of new legal theories. Therapeutic jurisprudence in drug courts reshapes the very fabric of criminal adjudication and redefines the meaning of justice.

The article argues that there are many unintended consequences of problem-solving courts. One such consequence is that drug courts have coercive tendencies, even to the point of being punitive. Problem-solving courts often apply specialized terminology that often has little therapeutic effect other than a reinterpretation in terms of therapeutic effect. Nolan points out that indeterminate sentencing creates a structural relocation within the courts rather than within the correctional environment. Nolan and other critics of the rehabilitative ideal and problem-solving courts argue that indeterminacy can lead to serious violations of

individual rights. Professor Nolan also criticizes the net-widening effect of problem-solving courts because it extends the court's authority into the lives of drug court clients in unprecedented ways. Finally, Nolan recognizes the blemishes within the legal system, but he argues that the agents of legal change need to understand the substance of ideological systems and the consequences these innovations may have on the administration of justice.

Janet York et al., Family Drug Treatment Courts and Social Determinants of Health, 50 FAM. CT. REV. 137 (2012).

This manuscript discusses the framework of Family Dependency Treatment Courts (FDTC). It describes the Family Recovery Court of Charleston, Inc., which provides services that improve the health of women and children involved in the FDTCs. Family Dependency Treatment Courts are therapeutic courts in which there is a collaborative effort among legal, child welfare, treatment, and health practitioners to conduct a comprehensive family needs assessment. Studies have shown that FDTCs are more effective in improving treatment compliance, motivation, maintenance of sobriety, completion of court programs, and recidivism, as well as improving outcomes for families, when compared to traditional courts. The philosophy behind FDTCs is to provide supportive services directed at strengthening social support, improving occupational abilities, offering financial support, increasing educational opportunities, and obtaining meaningful employment. This manuscript argues that FDTCs can alter social determinants (including social institutions, surroundings, and social relationships), because they provide a multidisciplinary action plan to help families achieve health equity. In a FDTC, the family receives comprehensive treatment as a unit, referred to as "wrap services." Wrap services are evidenced-based interventions that provide multi-level and multi-modal services delivered through a multidisciplinary team.

The Family Recovery Court of Charleston, Inc. offers health and family wrap services and positively impacts the social determinants of health in a state with poor health indicators for children and families. Parents who have an alcohol and/ or substance abuse disorder and have minor children who have been removed from their custody due to child abuse or neglect stemming from the parent's substance abuse problems are eligible

for the program. A majority of participants in the program were young, undereducated, unemployed, single females, living at or below the poverty level, who often had several young children. The program extends over a twelve to eighteen month timeframe, with Court supervision gradually decreasing as the parent progressed through the program. It utilizes a risk and protection factor model to determine court interventions. Risk and protective factors are characteristics or conditions that increase or decrease the likelihood that youth will develop mental health problems or suffer adverse outcomes.

The writer identifies three wrap services of the Family Recovery Court: family-oriented addiction treatment; a strengthening families program; and a smoking cessation program. The family-oriented addiction treatment program provides an assessment of environmental, cognitive, and emotional indicators of the substance abuse from a female perspective. Children may reside with the parent. This aspect of the program has been shown to increase the likelihood of completion of treatment and maintenance of abstinence from drug use. Services are also delivered directly to the child as well as through family interventions. The strengthening families program is a fourteen week program comprised of concurrent parent and child skills building, family dinners, and family skills building. Participants in the residential treatment or drug-free housing programs have had the success in the strengthening families program. The smoking cessation program is a health promotion wrap service encourages women to change or modify smoking practices by using behavioral counseling techniques. Women are advised to participate in the smoking cessation program instead of diverting family funds to buy cigarettes.

The article concludes by acknowledging that future research should continue to develop culturally appropriate parenting and family programs, assess potential factors for relapse, develop on-going mentoring and health coaching, and address the need for monitoring long-term outcomes.

Symposium, Drugs, Courts and the Penology, 20 STAN. L. & POL'Y REV. 417 (2009).

This article argues that the current methodology used by drug courts should be supplanted with practices that respond to problems that underline the interaction of race, poverty, and drugs

in urban settings. As an alternative to the current structure, the article proposes the use of a grand jury model. The article argues that current drug courts downplay the racial impact of American drug policy, and that therapeutic jurisprudence models cannot address the economic and racial impact of urban drug use. Instead of treatment solutions for the offender, the author suggests that an offender needs “tough love” discipline. The grand jury model is the proposed alternative because it is already in existence as a method of representation in the criminal justice system and it operates as an active political model.

NATIONAL ASSOCIATE OF DRUG COURT PROFESSIONALS available at www.nadcp.org (last visited Aug. 12, 2012).

National Associate of Drug Court Professionals (NADCP) is a national nonprofit organization determined to improve the justice system’s approach to dealing with drug-using offenders. The NADCP has established training programs to assist professionals in drug courts and has initiated a national campaign make drug courts accessible to those who need their services. The NADCP works in conjunction with drug courts, as well as other problem-solving courts.

Family Courts

Barbara Babb, Fashioning an Interdisciplinary Framework for Court Reform in Family Law: Blueprint to Construct a Unified Family Court, 71 S. CAL. L. REV. 469 (1998).

This article begins by assessing the ABA’s recommendation for the establishment of unified family courts in all jurisdictions. The article then evaluates how United States courts adjudicate family law matters and advocates systemic change by offering an interdisciplinary and therapeutic approach to the creation of unified family courts. The author presents a comprehensive overview of the results of her nationwide survey determining how each state’s courts handle family law matters. The results of her survey illustrate the need for a unified family court system in matters of family law because of inefficiency and inconsistency among the courts.

Professor Babb offers a five-part blueprint for constructing a unified family court. First, the court should have a specialized structure with judges who fully understand the legal and social

issues facing family law litigants. Second, the specialized court should be at the same level as a trial court of general jurisdiction, and the court should receive the same resources and support as the generalist courts. Third, the court should have comprehensive subject-matter jurisdiction over the full range of family law matters. The fourth component involves efficient case management and case processing systems with a single judge having continuous oversight over one case. Fifth, the court must offer alternative dispute resolution services and other court-connected social services to the family. Finally, the unified family court should be user-friendly and accessible to participation by all, including the large proportion of *pro se* family law litigants. The author argues that unified family courts are a necessary reform with great potential to improve family law decision-making and which will thereby enhance the lives of families and children.

Sue Badeau, Child Welfare and the Courts, THE PEW CHARITABLE TRUSTS (Mar. 1, 2004)

[http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/BadeauPaper\[1\].pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/BadeauPaper[1].pdf) (last visited Aug. 12, 2012).

This paper assesses the roles and responsibilities of state juvenile and family courts as key decision-makers for children within the child welfare system. The paper evaluates the expanded role of juvenile and family courts since the enactment of the Adoption and Safe Families Act in 1997. Badeau describes the new techniques and advances that courts have adopted to improve information access across child welfare networks and the improvements that courts have undertaken to make better decisions and benefit children in the child welfare system.

Pauline H. Tesler, Collaborative Family Law, The New Lawyer, and Deep Resolution of Divorce-Related Conflicts: An Essay and a Call for Research, 2008 J. DISP. RESOL. 83 (2008).

This opinion piece explores what is known, and what remains to be studied, in the discipline of collaborative law and the collaborative divorce practice. The author examines these processes and the benefits they deliver to clients, as well as their impacts on lawyers. Professor Tesler analyzes collaborative law and collaborative divorce practices based upon personal perceptions developed while she practiced collaborative law,

trained lawyers and mental health professionals, and developed the International Academy of Collaborative Professionals (IACP).

Today, collaborative lawyers offer services to clients in sixteen nations and utilize IACP standards that encompass a wide range of approaches to collaborative family law practice, including: “lawyers-only” models; a referral model using mental health or financial professionals; interdisciplinary collaborative teams; and hybrid models including mediators and consultants. The defining element of the collaborative law movement is that professionals are barred from participating in litigation. This essay analyzes why collaborative divorce practice has emerged alongside collaborative law and why deeper conflict resolution happens in cases in which collaborative lawyers integrate interdisciplinary team practice.

Professor Tesler concludes that the more experience in collaborative law or collaborative divorce practice that a collaborative lawyer has, the more likely it is that the lawyer will be able to facilitate deeper conflict resolution. The nature of the collaborative model forces lawyers to confront the insufficiency of their legal skills and understandings of the human dynamic to facilitate lasting conflict resolution. The team model of collaborative practice provides a reliable, coordinated, and structured system of advocacy and support to help parties focus on constructive conflict resolution.

Professor Tesler contends that over time, collaborative lawyers seek better techniques for conflict resolution and increase self-awareness in negotiating client-centered interests with other lawyers. Then, the interdisciplinary collaborative team practice forces the lawyer into a new dimension of conflict resolution, which engages the lawyer in a dynamic system that demands and supports accountability, respect, openness, and self-reflection. The author also points out the healthy impact the process has on children. The author recognizes empirical research is needed to confirm her theories about the benefits of interdisciplinary collaborative divorce practice. However, she urges family law lawyers to expand their understanding about how lawyers influence choices for clients and how those choices affect prospects for lasting conflict resolution.

Michael A. Town, *The Unified Family Court: Preventive, Therapeutic, and Restorative Justice for America's Families*, NAT'L COUNCIL JUVENILE & FAM. CT. JUDGES 14 (2002).

This article promotes a unified family court for families and children that is fair, effective, and utilizes therapeutic, restorative, and preventive justice models. The author argues that applying preventive legal concepts to the family court system will save lives, reduce injury, and provide needed services to children and families within the family court system. A unified family and juvenile court committed to ideals of preventive, therapeutic, and restorative justice will better serve children and families, promote fairness, and, where possible, restore relationships.

The unified family court structure requires comprehensive jurisdiction, a family court center, trained judges and staff, access to the court, alternative dispute resolution, and access to community and public services. Jurisdiction must include divorce, paternity, juvenile delinquency, child abuse and neglect, termination of parental rights, adoption, guardianship, domestic violence, child support, commitment issues, and in some states, criminal jurisdiction over domestic violence. The court system should have a family screening and assessment center. Judges and court staff must possess the interest and temperament to deal with families and *pro se* litigants who are in distress. Therefore, judges and staff need training in areas of psychology, medicine, social work, science, mediation, and family dynamics. The unified family court should be accessible to everyone, similar to an emergency room, with procedures in place to ensure prompt and effective adjudication. The least intrusive method of resolving the legal or social problem should be utilized, which will require early assessment and diversion. Lastly, the unified family court must provide access to variety of community and public services.

Louise G. Trubek, *Context and Collaboration: Family Law Innovation and Professional Autonomy*, 67 *FORDHAM L. REV.* 2533 (1999).

In response to inadequacy in family law services, three new practices are emerging—multi-professional cooperation, community education, and information networks. The author describes each of these practices, their origins, funding, and collaborative systems. The article also examines how legal

institutions are responding to the challenges associated with these practices, including balancing autonomy values and collaborative techniques in family law.

Immigration Courts

Peter L. Markowitz, Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study, 78 FORDHAM L. REV. 541 (2009).

Professor Markowitz's article presents a case study of the Varick Street Detention Facility in New York City, conducted by the Subcommittee on Enhancing Mechanisms for Service Delivery, a study group for Immigrant Representation. The article highlights the legal and institutional barriers that have created a national immigration representation crisis. In Part I, the article describes the systemic factors that have led to the scarcity of quality immigration representation. Part II examines barriers to quality representation of immigrants within the Varick Street Detention Facility. The first barrier to quality legal representation is the lack of available legal resources. The detainees of the Varick Facility, who are prosecuted in New York City, have their cases heard in the Varick Street Immigration Court. Other detainees are transferred to outside jurisdictions, where they are less likely to receive legal representation. Those who stay within Varick Street Immigration Court are typically represented by private attorneys. The quality of the Varick detainees' representation has been questioned by immigration judges. Finally, the article suggests policy, communication, and *pro bono* reforms addressing the lack of immigration representation on a state and nationwide basis.

Juvenile Courts.

George W. Gowen, 58 Fed. Law 72 (2011) (reviewing Lynee F. Katz et al, Child-Centered Practices for the Courtroom and Community: A Guide to Working Effectively with Young Children and Their Families in the Child Welfare System (2011)).

This book offers new approaches to the child welfare system, such as specialized juvenile dependency courts as a non-traditional approach to child welfare problems.

Linda Morton & Floralynn Einesman, The Effects of Mediation in a Juvenile Incarceration Facility: Reduction of Violence Through Transformation, 49 CLEV. ST. L. REV. 255 (2001).

This article describes the structure, objectives, and effects of a mediation program at California Western School of Law for residents at the juvenile detention facility in San Diego. The mediation program established two objectives of dispute resolution: (a) to decreased violence, and (b) to transform the way the disputants view themselves. The developers of the program believed that if they transformed self-concepts among the population in Juvenile Hall, then violence would decrease and peaceful resolution would increase.

The article assesses the success of the program by evaluating the number of disputes resolved, the reduction of violence during the mediation program, and whether resident juveniles experienced increased levels of empathy and empowerment. The program reported a success rate of 89% of the disputes it mediated. The data was incomplete on the number of violent incidents, but staff members indicated that law school's presence reduced the tension at Juvenile Hall. To obtain data on the transformation of the juveniles, the program surveyed residents of Juvenile Hall. The article recognizes that the survey method had some flaws; however, 76% of the residents responded that the mediation process was worthwhile. The article concludes with the limitations of the program and data collection methods, and it suggests reforms to improve its design and evaluation methods.

Carolyn S. Salisbury, From Violence & Victimization to Voice & Validation: Incorporating Therapeutic Jurisprudence in Children's Law Clinic, 17 ST. THOMAS L. REV. 623 (2005).

This article argues that it is critical for client voices to be heard in therapeutic jurisprudence scholarship so that client communities can contribute their own perspectives on such To incorporate therapeutic jurisprudence into the University of Miami Children & Youth Law Clinic, the clinic established the Voice Project. The Voice Project is a collaborative effort with Professor Bruce Winick that incorporates the goals of teaching students to apply principles of therapeutic jurisprudence, to engage in multi-disciplinary research and study, to reform the law within therapeutic jurisprudence principles, and to add youth voices to the

discussion on the child welfare system. The study group for the Voice Project was a group of female foster children who were victims of abuse and who were committed to psychiatric facilities. Overwhelmingly, the girls expressed three levels of trauma, including sexual abuse, forced psychiatric treatment, and the experience of being voiceless in the legal system.

The article examines how therapeutic jurisprudence can prevent foster children from viewing the law as another traumatic experience. It suggests that lawyers provide voice and validation for foster children in the psychiatric facilities. Voice, the author explains, is the ability to tell your story, and validation is knowing that what you have said was taken seriously. Research demonstrates that triggers for girls' aggression can be related to perceptions of rejection by authority figures. Therefore, if children's voices are heard and validated, then they may no longer feel the need to express aggressive behaviors.

Additionally, the article examines how the clinic successfully utilized therapeutic jurisprudence arguments in legal advocacy before the Florida Supreme Court to further foster care law reform efforts. The Juvenile Court adopted a rule that affords the child a "meaningful opportunity to be heard," before the child can be committed to a psychiatric facility. Finally, the article addresses the pedagogical value of incorporating therapeutic jurisprudence in clinical legal education. It encourages clinicians to establish Voice Projects within their own law schools in order to enable students and clients to transform the law's potential for healing.

Patrick Geary, Note, Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System, 5 YALE J. HEALTH POL'Y L. & ETHICS 671 (2005).

This note explores how juvenile courts provide inadequate mental health services to children and families. Part I of the note suggests that juvenile courts are uniquely positioned to address the needs of youth suffering from mental disabilities, because the juvenile justice system is in place to look after these children. In Part II, the note addresses the scope and nature of those needs and the obstacles preventing the juvenile courts from providing mental health services. The author asserts that critics of the juvenile justice system maintain that there is a relationship between

delinquency and mental illness. These critics argue that there is an overall need to reform the juvenile courts in order to address treatment inadequacies and prevent recidivism. Research indicates between fifty and seventy-five percent of detained youth have psychiatric disorders, far exceeding the rate among the general public. Disorders noted are ADD, ADHD, substance abuse, learning disabilities, mental retardation, anxiety disorders, and conduct disorders.

Part III of this note advocates for the incorporation of therapeutic jurisprudence and the problem-solving court models into the juvenile justice system in order to address juvenile mental health needs in the courtroom. The author suggests that effective screening methods, training court staff to deal with juvenile mental health issues, and integrated, coordinated efforts across the juvenile justice, mental health, and educational systems will promote adequate treatment. Proposed methods to implement reform are discussed in reference to RECLAIM Ohio, the Virginia Juvenile Community Crime Control Act, and the Schiff-Cardenas Crime Prevention Act—all examples of legislative initiatives incorporating community-based strategies to reform the juvenile justice system.

Greg Volz, Youth Courts: An Idea Whose Time has Come?, 33 PA. LAW 16 (2011).

This personal narrative describes one lawyer's initiatives to develop a Youth Court at Chester High School through the Stoneleigh Foundation in Philadelphia. In 2007, Volz began training students at Chester High School to operate a youth court as an alternative discipline model.

A youth court is an alternative disciplinary system for youths, who have committed an act that violates the norms of a school or community. As of 2011, more than 1,150 youth courts are operating in the United States. Youth courts use the power of positive peer pressure to reshape the offender's behavior. The article contends that youth courts provide a platform for youth development and effective justice strategies.

Pennsylvania's Juvenile Justice Report showed that Pennsylvania's public schools' zero-tolerance policy and school-to-prison pipeline prevented just juvenile disciplinary action. The report encouraged the Pennsylvania Bar Association to improve communication and coordination between the education and justice

systems, and to endorse youth courts. The Pennsylvania youth court system has evolved with the support of the local legal community, education community, and philanthropic community, thereby building a statewide public/private partnership of youth courts.

Heather A. Cole & Julian Vasquez Heilig, Developing a School-Based Youth Court: A Potential Alternative to the School to Prison Pipeline, 40 J.L. & EDUC. 305 (2011).

The development of the Parker Middle School Youth Court in Peters, Texas is described in this article that explores the tensions that exist between the legal and educational systems in its implementation. Public schools have responded to the decrease in youth crime by imposing harsh punishments on students, essentially pushing juveniles from school into the prison pipeline. However, research shows a negative relationship between the use of school suspension and expulsion and academic achievement. Such potential exclusionary policies have encouraged educators and policymakers to look to alternative disciplinary solutions. Youth courts have become the popular alternative discipline model for non-violent offenders in the last decade.

In the initial implementation phase of the Parker Middle School Youth Court, the designers of the program, policy implementers, and school administration have all disagreed about the concept of the Youth Court. The school administration has supported the program but has faced many logistical, competing, and community challenges. Tensions arose between the legal system and school system. A strong law enforcement presence at the school contradicts the equity-minded reform sought by the Youth Court. Organizational and structural challenges related to goal alignment appeared when the school did not plan for accommodations with the Youth Court. In addition, the school resisted referring non-school related misconduct to Youth Court. The law student developers recognized that the program would have to continue to work to build support and capacity over time.

The authors assert that as the Youth Court moves beyond the implementation phase, further analysis will be conducted to track students' recidivism rates and academic progress. This program aspires to provide a roadmap for operating school-based Youth Court programs over the long-term and a blueprint for legal

and educational systems as they work together to mend the school-to-prison pipeline reality.

Mental Health Courts

Tammy Seltzer, Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illnesses, 11 PSYCHOL. PUB. POL'Y & L. 570 (2005).

Professor Seltzer's article identifies flaws within mental health courts and argues for an alternative model to address the overrepresentation of people with mental health issues within the criminal justice system. First, the author delves into the context of mental health courts and underscores how adults with mental health issues are twice as likely to be arrested as adults who do not suffer from mental illness. Next, the author focuses on the procedural concerns within mental health courts, such as voluntary transfer into mental health facilities, the right to withdraw from mental health programs, appointment of legal counsel, plea requirements, and the right to medical privacy.

The crux of the article centers on the author's presumptive "fatal flaws" in mental health courts—lack of therapeutic treatment, along with the failure to address housing needs, health care, and vocational training. The author argues that, to reduce recidivism of offenders with mental illnesses, mental health courts must offer more than some medication and occasional therapy. She also argues that mental health courts focus incorrectly on misdemeanors. Under the current model, mental health courts fail to address many mental health problems and often times exacerbate mental health issues through the trauma of arrest and incarceration. The criminal justice system is not the appropriate system to assess someone's mental health because those determinations are often difficult to diagnose, even with proper mental health training. Professor Seltzer contends that to eliminate the criminalization of people with mental illnesses, communities need to address the cause, not just the symptoms of the problem.

Lastly, the author suggests diversion programs or alternative sentencing practices as substitutes for the current mental health court model. The author cites the Village Integrated Service Agency in California, the Mental Health Diversion Program of Jefferson County, Kentucky, and the Nathaniel Project

in New York as more effective prevention programs as compared to mental health court practices. These programs provide mental health services that target people with mental illness that are at risk of coming into contact with the criminal justice system, are nonviolent offenders, or have been charged with serious offenses.

Ginger Lerner Wren, Mental Health Courts: Serving Justice and Promoting Recovery, 19 ANN. HEALTH L. 577 (2010).

This article addresses the legal response to mental illness in the United States and describes the unique perspective of the Broward County Mental Health Court. Part I of the article outlines the vast scope of the mental health problem in the United States and summarizes the reasons for the large number of mentally ill inmates, including stigma, financial limitations on treatment, and poor mental health delivery systems. The criminalization of the mentally ill is a consequence of untreated mental health conditions due to underfunded community care systems, lack of adequate housing, homelessness, and lack of support for reentry into the community.

In Part II, Judge Wren describes various legal responses to the mental illness in the criminal justice system, such as therapeutic jurisprudence, which she calls the mental health approach to law. Incorporating this approach, mental health and criminal justice systems have implemented programs to divert mentally ill offenders away from the criminal justice system and towards treatment. Next, the judge describes the concept of diversion. Diversion has been defined as “any deviation from the ordinary criminal justice process before an actual prosecution which suspends the case without the court actually making a judgment, and which makes the offender participate in some type of non-penal program.” Diversion programs typically incorporate some form of identification and screening along with a collaborative process to connect the individual with mental health systems. The mentally ill offender may be diverted from the criminal justice process either during pre-booking or post-booking interventions. Pre-booking diversion occurs before an arrest when a specially trained law enforcement official interacts with police and community mental health services. Post-booking diversion occurs upon arrest or at later stages of the criminal justice process. Benefits of diversion programs include: improved mental health outcomes, reduced rates of hospitalization and recidivism,

improved access to mental health services, and reduced costs to government. Although diversion programs offer some levels of success, the judge, nevertheless, advocates for mental health courts.

Part III outlines the background and rationale for mental health courts and details the strategies utilized by the Broward County Mental Health Court. The adoption of mental health courts was a judicial response to the trend of criminalizing the mentally ill. This post-booking diversionary model looks to identify offenders with mental health issues and connects them to community -based mental health and substance abuse programs. The first mental health court opened in Broward County, Florida in 1997.

Today there are more than 175 mental health courts operating in the United States. These Courts generally deal with individuals who have minor offenses and rely upon on other agencies for the assessment and treatment of patients. Studies indicate that mental health court participants are less likely to be rearrested and have favorable interactions with the court system. Mental health courts will gradually produce financial savings for the government.

The Broward County Mental Health Court operates as a part-time court. It was designed to divert misdemeanor, non-violent offenders with mental illness from jail. Usually, family members, lawyers, jail staff, or county criminal judges refer potential clients to the court within twenty-four hours of arrest. Individuals are screened in the courtroom by a licensed social worker, who determines the individual's eligibility for participation in the mental health court, whether he or she is competent to stand trial, or whether she or he should be involuntarily commitment to a hospital. In most cases, adjudication is withheld, which means a record is made of the arrest and court disposition but no judgment is entered. While the Broward County Mental Health Court integrates the concept of therapeutic jurisprudence common to all problem-solving courts, it differs greatly from other drug courts or problem-solving courts. The Court does not require court participation. The objective is diversion out of the criminal justice system. The Court is voluntary and highly individualized and operates at a pre-trial stage.

In conclusion, Judge Wren advocates for mental health courts, but she warns that all problem-solving courts need to

balance treatment and successful outcomes with individual constitutional and due process rights, mental health care policy, and public safety concerns. Mental health courts have made positive changes in altering attitudes about criminalizing the mentally ill.

Developments in the Law—The Law of Mental Illness, 121 HARV. L. REV. 1168 (2008).

This article addresses the transformation of mental health courts in the United States over the last decade. Mental health courts (MHCs) have gained recognition and support, due in part to funding by the U.S. Department of Justice as a joint initiative of the President and Congress to increase access to mental health services. Section A of this article analyzes the social and fiscal benefits and opportunities of mental health courts. It argues that the long-term benefits of mental health courts outweigh their initial startup costs. Early studies of MHCs indicate that graduates are over 75% less likely to reoffend with twelve months, and that reoffenders are 88% less likely commit a violent offense. Lower recidivism rates reduce criminal justice system costs and add value to the local community.

Section B discusses the evolution of theories of punishment in the American criminal justice system, and their influence on problem-solving courts. Notably, the article addresses the recent theoretical dialogue advocating the integration of rehabilitation and community-based solutions into the criminal courts through the influence of therapeutic jurisprudence. The final section concludes with an optimistic forecast for the future of America's criminal justice system due to growing support from Supreme Court Justices, the ABA, and scholars toward rehabilitation and away from retribution.

Domestic Violence Courts

Lynne M. Kenney & Diane Vigil, A Lawyer's Guide to Therapeutic Interventions in Domestic Relations Court, 28 ARIZ. ST. L.J. 629 (1996).

This article argues that it is time for the roles of mental health professionals to be expanded in domestic relations cases. This article urges lawyers and judges in domestic relations cases to use an empirically based decision-making model when referring

families for informed therapeutic interventions. A decision-making model with language commonly agreed upon by judges, attorneys, and mental health professionals is imperative in determining the level of therapeutic intervention that a family needs.

This article reviews family law reform, demographics of divorce, the process of dispute resolution in child custody cases, current use of mental health interventions, and recommendations for the future use of a decision-making model of therapeutic interventions in family court. Family law reform has taken the form of “unbundling” of services, unifying family courts, and redefining the application of litigation to family conflicts. The article explores the recommendations of Professor Mosten that family lawyers should play host of different roles, including coach, dispute manager, consultant, family advocate, and preventive legal health care provider.

The article examines the Parent Education and Custody Effectiveness (“PEACE”) program in New York, a program that focuses on utilizing multidisciplinary teams to help parents through the divorce process. Judges, legal professionals, and mental health professionals can all refer parents to the integrated program. The PEACE program offers information to parents regarding legal processes, the effects of separation and divorce on adults and children, and coping techniques for families. Initial results show that parents feel empowered and educated by the PEACE program.

This article advocates for a common dialogue regarding therapeutic interventions so that legal and mental health care professionals can work together to refer families to treatment. Kennedy and Vigil suggest that the common dialogue incorporates available interventions, definitions of interventions, referrals and choices among interventions within ethical considerations, selection of an appropriate mental health clinician, definition of the role of a mental health clinician, and monitoring of clinicians’ work. The therapeutic intervention model integrates empirical research and clinical practice management with psychological issues surrounding divorce. According to Kennedy and Vigil, this model responds to the vast and diverse population of divorced persons with children by recommending interventions based on differing needs.

Catherine Shaffer, Therapeutic Domestic Violence Courts: An Efficient Approach to Adjudication?, 27 SEATTLE U. L. REV. 981 (2004).

Judge Shaffer's article addresses the need for and benefits of creating therapeutic domestic violence courts. The article traces the history of state intervention in curbing domestic violence and explores the prevailing attitudes that have undermined the success of legislative reforms. Notably, Shaffer points out that misinformed judges refuse to issue orders either because they believe the victim "refuses" to leave the batterer, or because judges express hostility towards the victim. Shaffer not only addresses the large number of domestic violence incidents but also their impact on victims and children of victims. Shaffer presents the therapeutic jurisprudence court model of the drug and mental health courts as successful methods for creating domestic violence courts and reducing criminal recidivism. In conclusion, Shaffer proposes that therapeutic domestic violence courts are an economically efficient model to address the growing incidents of domestic violence and costs of incarceration.

Street Court

Martha Neil, For Those Teetering on the Edge, Street Outreach Court Offers a Push in the Right Direction, AMERICAN BAR ASSOCIATION (Dec. 28, 2010)

http://www.abajournal.com/news/article/for_those_teetering_on_the_edge_street_outreach_court_offers_a_push_in_the_-9k-2012-04-15 (last visited Aug. 30, 2012).

This brief post on the ABA website describes the Street Outreach Court in Ann Arbor, Michigan, which was created by Judge Elizabeth Hines. The Street Outreach Court, created seven years ago, was intended to extinguish legal and non-legal issues of those with outstanding warrants. Currently, the court works with non-violent offenders who have established an action plan with the social service agency to cancel their warrants and waive unpaid fines. Offender plans of action are aimed at addressing issues of homelessness, unemployment, substance abuse, and lack of education within the Ann Arbor community.

Tina L. Rasnow, Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities, 29 FORDHAM URB. L.J. 1281 (2002).

This article begins by questioning the extent to which counsel should be appointed in civil cases when a party cannot afford to hire legal representation. The Ventura County Superior Court in California has begun to take a proactive role in assisting those without legal counsel by establishing court-run self-help programs. Ventura County began its self-help program by opening its Family Law *Pro Se* Clinic in 1996, and since has expanded to assist *pro se* litigants with non-family law matters. The self-help program of Ventura County has spread to include off-site locations that serve minority populations, and operates a cost-effective mobile unit that takes self-help services to outlying communities. This article highlights the challenges to and the benefits of the Ventura County Self-Help Program. Interestingly, maintaining neutrality with court-based self-help staff has been an issue for the program. However, constant contact with the community has developed Ventura County Superior Court's understanding of the issues and challenges faced by the community it serves.

Stephen R. Binder, The Homeless Court Program: Taking the Court to the Streets, 65 FED. PROBATION 14 (2001).

Mr. Binder explains that, as a frustrated public defender, he came up with the idea to open San Diego's Homeless Court Program in 1989. This Court system recognized that homeless veterans were not attending court hearings due to their status and living conditions, rather than due to their disregard of the court system. The Homeless Court provided the veterans access to the court system and the ability to resolve backlogged cases. At the same time, the Homeless Court gained a better comprehension of needs of homeless veterans. The San Diego public defender's office collaborated with the city's Stand Down initiative to assist homeless veterans with outstanding warrants and put the veterans on a path to independence.

To sign up for the Homeless Court Program ("HCP"), a participant must gain the trust and confidence of a homeless shelter or program. The caseworkers from each shelter gather lists of people requesting access to the court. The Public Defender then reviews the list, forwards it to the prosecution and court, and the

court prepares a hearing. Mr. Binder states that, prior to 1989, the criminal justice system relied on the courthouse and jails to administer justice. However, the Stand Down initiative seeks justice by utilizing groups that provide counseling and services for the homeless. Through this collaboration, the San Diego Homeless Court has successfully integrated many homeless individuals back into society.

Elizabeth Cooper, Street Justice: Street Court Clears Homeless of Old Charges and Fines, MEMPHIS FLYER, (July 19, 2012) available at <http://www.memphisflyer.com/memphis/street-justice/Content?oid=3227964> (last visited Aug. 1, 2012).

This article recounts Memphis' second Project Homeless Connect community support day, in which over 200 homeless participants were paired with volunteers to assist them with services such as Social Security benefits, obtaining a valid photo identification, access to veteran's benefits, and access to medical, housing, and legal assistance. In addition, a street court was constructed to alleviate legal impediments of the homeless in their quest to find employment and housing. The one-day Street Court mediated twenty-two cases, provided legal assistance for one-hundred-sixty-one individuals, and obtained housing for forty-four participants.

Robert Stein, Paving the Way for Justice: The ABA Commission on Homelessness & Poverty Takes the Law to the Streets, ABA JOURNAL (July 2005).

This ABA-sponsored report addresses the ABA's priority of facilitating the increase of homeless courts in America. The ABA executive director argues that the United States needs additional homeless courts because homeless individuals do not have the resources or abilities to respond to citations issued for even minor offenses. As a result, minor offenses often go unaddressed, resulting in additional fines. Therefore, the homeless segment of the population is in need of legal services, as well as drug and mental health treatment and employment and housing services. The ABA commission, along with commission member Stephen Binder, has been instrumental in establishing homeless courts, which seek to expand homeless people's access to the courts, reduce costs, and reintegrate homeless individuals back into society. The ABA is committed to educating the bar and the public

about homelessness and poverty while lobbying Congress to develop and fund programs that address homelessness and poverty.

Community Courts

Quintin Johnstone, The Hartford Community Court: An Experiment that Has Succeeded, 34 CONN. L. REV. 123 (2001).

This article discusses the successes and challenges of the Hartford Community Court in Connecticut. This community court is a problem-solving court that primarily deals with low-level misdemeanors and some city ordinance violations. The Hartford Community Court's objectives are to punish offenders, improve the neighborhood's quality of life, reduce crime, and aid offenders in overcoming personal obstacles that may have contributed to their wrongful actions. Unlike other low-level criminal courts, this community court devotes time to each defendant and her sentencing with a process focused on remunerative and remedial goals. While this article credits the success of the Hartford Community Court to its staffing, procedural operations, programs, and facilities, the court has faced some problems, such as the discontinuity of its case flow. The article offers suggestions to ease these lingering issues.

Veteran Courts

Steven Berenson, The Movement Towards Veteran Courts, 44 CLEARINGHOUSE REV. 37 (2010).

Professor Berenson addresses the "invisible wounds" with which military veterans return home after combat, such as posttraumatic stress disorder, severe depression, and traumatic brain injury. These invisible wounds can contribute to veterans' involvement with the court system. This article describes the initiatives that some jurisdictions have established to combat the unique issues of returning veterans. The article also advocates for the creation of more veterans' courts and offers some considerations regarding their development.

Steven Berenson, Legal Services for Struggling Veterans: Then and Now, 31 HAMLINE J. PUB. L. & POL'Y 101 (2009).

This Southeastern Minnesota Regional Legal Services symposium article discusses how the legal system has not previously considered struggling veterans as a demographic group that needed access to *pro bono* legal services. Professor Berenson defines a struggling veteran as a veteran who suffers from one or more disabilities and has a low income that would qualify him or her to receive free legal assistance.

Professor Berenson argues that struggling veterans have stood apart from other subordinated groups in America. One limitation on a veteran's ability to obtain legal assistance in seeking VA benefits was an 1862 statute that limited the amount for attorneys' fees. The amount later was increased to \$10, but the limitation was in effect until 2007. Non-profit organizations representing veterans have become bogged down with heavy caseloads and have not been able to provide effective resolution of veteran claims. Berenson complains that the Veterans' Judicial Review Act has changed the system to one in which veterans must satisfy legal requirements before they are entitled to administrative and judicial review.

Additionally, Professor Berenson's essay addresses the challenges faced by returning veterans after service in Afghanistan and Iraq. The positive side is that public opinion of veterans has improved over the past several years, due mainly to the highly visible physical impacts suffered by those returning from combat. However, the "invisible injuries" of Post Traumatic Stress Disorder (PTSD), major depression, and Traumatic Brain Injury do not receive the same attention. Professor Berenson points to some features of the current conflict that might be influencing the increase of these "invisible injuries." Extended deployments, high survival rates of wounded service members, the changing nature of combat with the use of improvised explosive devices, and the cumulative effects of mental health issues are features that may contribute to the rise of "invisible injuries."

Momentum for the veterans' movement has gained steam from the passage of legislation in 2007 and increased public awareness. However, budgetary constraints on the federal government make veterans unlikely candidates for additional services. Thus, initiatives outside the scope of legal services have

been created to bring legal services to struggling veterans. The essay mentions the efforts of private law firms who have launched *pro bono* projects for veterans, law school clinics, and legal clinic collaboration with veteran homeless and substance abuse services. Professor Berenson concludes with a proposal for more legal initiatives that specifically address the unique needs of veterans, both within the VA system and in non-VA related matters.

Bianca Phillips, Vetting Justice: New Court for Veterans Seeks Mentors to Pair with Vets, MEMPHIS FLYER, (Aug. 2, 2012) available at <http://www.memphisflyer.com/memphis/vetting-justice/Content?oid=3238067> (last visited Aug. 15, 2012).

The Shelby County Veterans Court opened in August 2012 with the goal of keeping veterans out of jail. The Veterans Court identifies veterans charged with misdemeanors or property crimes and matches them with treatment programs and mentors. A veteran may have his record expunged after successfully completing the program. This court-run program not only pairs veterans with mentors, it also connects them with Veterans Administration services they may not be utilizing. The Shelby County Commission provided the initial funds to run the Veterans Court, but the Court will have to rely on the federal government for any additional required funding.

Evan R. Seamone, Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran's Legal Decision-Making Process, 202 MIL. L. REV. 144 (2009).

The article contends that PTSD has transformed legal assistance and trial defense attorneys into “first responders” to ensure the well-being of combat veterans in the legal system. According to the author, the term “first responder” applies to a broader spectrum of individuals than just those who employ emergency services. Congress now considers victim advocates as first responders because they are the first people to have contact with sexual assault and disaster victims. Thus, at times attorneys serve as first responders because they are first on the scene and can often prevent potential emergencies. Unlike medical professionals who are trained to diagnose and treat veterans with PTSD, lawyers are not equipped with such training and often must overcome a lack of experience to effectively counsel service members. An

untreated client, therefore, can easily transform an attorney into a PTSD first responder.

This article teaches that PTSD is likely to exist beneath the surface of a client's case rather than being directly tied to her legal issue. The article identifies the importance of framing the issue, even though it might not be a strictly legal issue. By focusing solely on the ultimate legal issue, a lawyer may overlook less obvious issues that are still related to the legal problem. Ultimately, the limited scope of an attorney's duty may aggravate a client's condition, while at the same time causing the attorney to neglect her professional responsibility. Attorneys need to have knowledge of PTSD in order to identify the need for mental health referrals. This article advocates for a collaboration between attorneys and mental health professionals to address the growing needs of combat veterans returning from Iraq and Afghanistan.

L. Gambling Courts

Debra Cassens Weiss, Treatment an Option in NY Gambling Court, ABA JOURNAL (May 1, 2007) available at <http://www.abajournal.com/news/article/treatment-an-option-in-gambling-court/> (last visited Aug. 30, 2012).

The nation's first gambling court in Buffalo, New York permits first-time offenders to opt for treatment instead of jail time. Justice Mark G. Farrell presides over cases that range from burglary to forgery. According to court staffers, more than 100 defendants have successfully completed treatment programs for gambling addiction.