Minding the Elephant

CRIMINAL DEFENSE PRACTICE IN COMMUNITY COURTS

By Julian Adler and Brett Taylor

Failure of existing rules is the prelude to a search for new ones.

—Thomas S. Kuhn[1]

If you find yourself in a hole, stop digging.

—Will Rogers[2]

Community courts are uniquely local institutions that strive to deliver a more responsive brand of justice. Although each program is "specifically tailored to reflect the needs of the neighborhood it serves,"[3] all courts share a fundamental commitment to engaging communities and offering meaningful alternatives to incarceration.[4] The model is deliberately flexible to account for a jurisdiction's resources and constraints, allowing for recent replications in smaller towns like Milliken, Colorado,[5] and in larger cities like Newark, New Jersey.[6]

One of the enduring critiques of community courts is that they are perceived by some to deny defendants their constitutional guarantees of due process of law. Furthermore, it is often alleged that a less-than-zealous defense bar is complicit in the denial of these protections. However flawed, this critique has effectively stifled discussion about criminal defense practice in community courts. It has been nearly two decades since the launch of the first community court,[7] and yet the role of the defender remains the proverbial elephant in the room for many proponents of the model. But the time is ripe for an open dialogue about this critical issue. Contrary to the familiar objections, community courts can actually enhance defense practice by providing opportunities for heightened advocacy *and* individualized case resolutions that go beyond the traditional sentencing options of jail and fines.

Upon closer inspection, the typical defense objections to community courts fall squarely into one of two categories: (1) concerns about a lack of adversarial process and (2) concerns about a lack of proportionate sentencing. This article focuses on the questions and criticisms most frequently raised by practicing lawyers—*not* academics; *not* straw men. To frame the discussion and provide a look at commu-

nity courts in action, consider the following case examples culled from our collective experience as practitioners at the Red Hook Community Justice Center, a community court in Brooklyn, New York:

- *James[8] is a 32-year-old male who uses heroin and has a criminal record dating back 13 years. He has 14 prior misdemeanor convictions but no felony record. James currently has an open misdemeanor warrant and has been arrested on a new charge of drug possession. This is James' first time in a community court, and he initially assumes that the judge will automatically set bail based on his record. However, his attorney advises him about treatment options, and James agrees to be assessed by a social worker prior to arraignment. Although James agrees with the social worker's recommendations for drug treatment, including a seven-day inpatient detoxification program ("detox") to safely withdraw from opiate dependence, to be followed by a 28-day inpatient rehabilitation program ("rehab") to begin the hard process of recovery, he doesn't feel ready to plead guilty to the charges just yet—even in exchange for a promise of dismissal from the prosecutor upon the completion of treatment. Pursuant to the advice of counsel, James agrees to enter detox and rehab as formal conditions of release; after successfully completing these programs and taking some additional time to discuss the merits of the prosecutor's case with his attorney, James accepts the terms of the plea bargain on the next court date. James is credited for the period of inpatient treatment, and he is mandated to complete the remainder of his sentence in an outpatient program.*

- *Natalie is a 24-year-old female in community court for prostitution; this is not her first contact with the justice system, but up until now she has managed to avoid a criminal record. After interviewing her, Natalie's attorney is concerned about cocaine addiction and the likelihood that she will soon obtain a criminal record, resulting in her eviction from public housing along with a host of other collateral consequences. Natalie agrees to be assessed; she then discloses to the social worker a history of childhood sexual abuse, recent engagement in sex work, and several years of cocaine use. The social worker recommends an outpatient program that specializes in the treatment of substance use and trauma. After speaking with her attorney, Natalie agrees to attend two mandated sessions at the outpatient program in exchange for a dismissal of the charges. Her attorney advises her about the benefits of continuing in the treatment program on a voluntary basis.*

- *Bonnie is a 40-year-old female with a lengthy criminal record dating back 10 years. She is being charged with possession of a crack pipe, though she vehemently denies guilt and refuses to even consider a plea—and there is "no way in hell" she is speaking to a social worker. Given the charges, her attorney successfully advocates for release without bond or bail. Bonnie returns to court on her next scheduled appearance and ultimately goes to trial before the community court judge. She loses at trial and is sentenced to complete community service and attend an on-site treatment readiness group. Bonnie reports that she is satisfied with the process and the outcome.*

- *Bruce is an 18-year-old male who received a summons for drinking in a local park, a noncriminal offense usually resolved with a $25 fine. The community court judge discovers after inquiring that Bruce recently dropped out of school and is planning on getting a GED[9] "at some point." The judge tells Bruce that he would be willing to waive the fine and dismiss the case if he simply goes upstairs to speak with the on-site GED teacher about the program; there are no other requirements, and Bruce's attorney encourages him to take the offer.*

Zealous Advocacy

Far and away, the most common defense objection to community courts is a perceived lack of adversarial process. Defense attorneys can be quick to cite the prevalence of plea bargaining as *prima facie* evidence of such paucity. This critique often frames community courts as "plea-bargain mills," churning out plea agreements at the expense of due process, compelling defendants to accept deals rather than fighting their cases at trial. For starters, as any follower of the criminal justice system could tell you, a very small percentage of cases in the American legal system ever make it to trial. In the regular criminal justice system, over 90 percent of criminal defendants end up taking pleas; in some jurisdictions, the number can go up into the high 90s.[10] There is no quantitative evidence to suggest that community courts have increased the rate of plea bargaining—but they may have improved the quality.

Community courts are designed to provide attorneys on both sides of the aisle with a broader range of options and resources from which to craft plea agreements (certainly more than they would ever have in a traditional court setting).

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With the exception of Bonnie, in the cases described above, the defense attorneys were able to negotiate pleas in the community court that were uniquely tailored to the needs and interests of their clients. Although the cases were all technically resolved through plea agreements, the substance of those dispositions varied significantly, responding to such complex issues as substance use, trauma, and access to alternative educational programs. Community courts raise the practice of plea bargaining to a more nuanced and individualized art.

Bonnie's and James' cases also demonstrate that there is a place for adversarial process in a community court setting. Defense attorneys tend to look skeptically on the fact that most community court jurisdictions are limited to misdemeanors and violations. Because these cases are not considered as serious and rarely go to trial in traditional court settings, some practitioners make an assumption that community courts are handling these matters without much in the way of due process. Additionally, the focus on social services and other alternatives to incarceration is somehow seen as diminishing or eclipsing the adversarial process. The view from the ground is rather different. Adversarial process and community court practice are not mutually exclusive; indeed, often they can enhance each other. At the end of the day, in any criminal matter, procedural protections are *always* a threshold consideration, but a community court adds additional capacity for attorneys to craft more meaningful resolutions—due process *and* "due outcomes."

Before leaving the subject of plea bargaining, it is important to address the criticism that defendants' due process rights are jeopardized if they are required to plead guilty in order to participate in a community court program. In fact, some community courts do require defendants to take pleas before accessing services, while others allow defendants to commence services as a condition of release (as in James' case) or as part of a pre-plea diversion strategy. Inherent in this argument is the view that the defense attorney's role is fatally compromised in these situations: If the attorney decides to contest the charges, he or she does so at the expense of a client obtaining much-needed help.

The reality is far more complicated. In state courts, these same defendants would almost always plead to receive short jail sentences without any type of social services. One criminal justice practitioner paints an even starker portrait: "Let's face it, in the traditional urban criminal justice system, defense lawyers don't have time to talk to their clients. You don't have time to investigate. You have completely coercive plea setups."[11] Nor would these defendants have an opportunity to have their pleas vacated and records expunged, as routinely afforded to defendants in community courts.

Where a guilty plea is required for community court participation, a majority of defendants make an informed decision with counsel to participate. Furthermore, in many of these courts, if the defendant does well, the pleas are vacated, the charges are dismissed, and the defendant walks away without a criminal record.

In a similar vein, defense attorneys practicing in community courts are sometimes described as "setting their clients up to fail" by pleading them out to service requirements with which they will—presumably—not be able to comply. But no one can predict with any certainty which clients will succeed or fail ex ante. Moreover, this line of criticism seems to imply that pleading to a definite short jail sentence is somehow less of a failure than a plea that holds the prospect of avoiding jail altogether. Separate and apart from how the case turns out in the end, it also is important for attorneys to consider their clients' perceptions of fairness and personal interests in justice. A 2006 study found that 85 percent of criminal defendants reported that their cases were handled fairly at the Red Hook Community Justice Center; these results were consistent *regardless* of a defendant's case outcome.[12] This suggests that attorneys may be too quick in calling a case a failure based solely on a calculus of wins and losses. As one defender opines, "lawyers may know what is best in the courtroom, but they do not always grasp what is best for the client."[13] Although Bonnie lost in the courtroom, she was satisfied with the way her case was handled and with a resolution that included a social service component.

The real issue that defense attorneys in community courts should be concerned with is ensuring that their clients are adequately assessed and connected with appropriate services, thereby maximizing their chances of success. If a defendant has repeatedly failed in drug treatment programs, for example, perhaps a more comprehensive assessment and holistic intervention would prove efficacious. Natalie's clinical presentation is quite common: Substance use often signifies an attempt to cope with a history of traumatization; co-occurring mental disorders, such as depression, anxiety, and post-traumatic stress, are also pervasive among adolescents and adults who use substances. One defense-minded academic provides vivid insight into how she would counsel a client to avoid an inapposite service plan: "If you're asking whether I would advise somebody who has jumped a turnstile to go into the mental health system, as it now exists, then my answer would be a flat 'No.'"[14] However, she goes on to describe a more nuanced calculus, balancing advocacy, on the one hand, with sensitive and informed counsel on the other: "If you ask me whether I would put this person in a program that somebody has investigated, that targets this defendant's particular needs, and that gives this defendant a second chance if that type of treatment doesn't work, then I might have a different reaction."[15]

Along these lines, defense attorneys need to advocate for realistic expectations. Ultimately, if interventions like drug treatment are to be considered legitimate alternatives to incarceration, it is the responsibility of the defense attorney to help the court to understand that "relapse is a part of recovery" and that, for many defendants, a higher level of care is a more effective sanction than a short stint in jail. In the universe of community courts, these kinds of arguments need to be as much a part of a defender's practice as hearsay objections and bail applica-

tions. For practical purposes, this is an issue that should either be thoroughly discussed in the planning process for a community court or used as a training opportunity in existing courts.

Finally, an overarching criticism of defense attorneys in community courts is that they are "team players" who have relinquished their ability to zealously advocate for their clients on a day-to-day basis. The argument typically goes something like this: Defense attorneys who repeatedly appear before the same judge and across from the same prosecutor in a smaller court setting are at risk of becoming chummy and less comfortable being argumentative. In our experience, a defense attorney's brand of lawyering is primarily influenced by the local professional community, such as the practices of their fellow lawyers, rather than their specific court assignment. Some places have historically had strong defense bars; others have not. Like any frontline practitioners, defense attorneys in community courts need to be on guard for complacency and falling into routines after years of dealing with large numbers of similarly situated cases and clients. Similarly, if there is ever a concern about, say, neutrality, defense attorneys may need to advocate for recusal of a judge during the sentencing process.

It is also important to note that community courts are not drug courts.[16] Although many community courts connect defendants to drug treatment programs, the language of team play has never been a part of the model or the vernacular. There may, however, be some conflation of community courts with defense attorneys' objections to drug courts;[17] but there is certainly no expectation that defense attorneys in community courts will comport themselves as members of a team, even if savvy defenders recognize an opportunity to obtain better deals for their clients by playing in the same "league" as the prosecution.

Proportionality

Defense attorneys worry that community courts engage in disproportionate sentencing practices; these apprehensions tend to center around a process of "net-widening." To avoid confusion, it is important to note that there are at least two distinct iterations of the net-widening concept—one of which concerns law enforcement tactics. For our purposes, "net-widening" describes the argument that community court practitioners inappropriately consider nonlegal factors in determining the length and scope of criminal sentences, thereby extending and expanding defendants' exposure to the criminal justice system.

At various points throughout the life of a case, community courts deliberately pay attention to an array of variables, including the clinical and social service needs of defendants, the voices of crime victims, and the quality of life in communities. Although community courts can and do render legally appropriate case dispositions, there is a need for defense attorneys to remain vigilant around sentencing. It can be tempting for well-meaning judges or prosecutors to try to "fix" a defendant with a heavy-handed intervention. It is critical for defense attorneys to always—regardless of the court setting—remain alert for signs of disproportionate sentencing practices masquerading as good intentions.

But by and large, a savvy defender can often achieve a much more favorable resolution in a community court than would otherwise be available in a traditional setting. Although defense attorneys may consent to a longer period of court involvement than they would for a similarly situated defendant in a traditional court, they are often doing so in exchange for a promise of *dismissal* upon completion of the obligations. As Natalie's attorney clearly understood, dismissal of the charges precludes the collateral consequences of a conviction (eviction from public housing, deportation, barriers to employment, to name a few), which are typically far more severe and enduring than the

sentence itself. As one scholar observes, "collateral consequences of a misdemeanor or even a violation conviction can be substantial and are often inadequately explained to a defendant. They are also overlooked by most of the actors in the system and, if considered, may well violate our basic notions of proportionality."[18] In fact, historically, defense attorneys were trained to ignore legal issues that were not considered criminal in nature, and oftentimes would refer clients to civil attorneys to deal with so-called peripheral matters. When viewed in the context of collateral damages, pleas to short jail terms appear far more punitive and devastating than a period of court-monitored social service in a community court.

Ultimately, the length and scope of any disposition should be determined by a legal calculus, one informed by substantive law, concerns about collateral consequences, and "the going rates" in a particular jurisdiction. Natalie's case is illustrative. Natalie presents with a range of complex and disconcerting clinical needs, but her criminal charges are relatively minor. Notably, Natalie's lawyer is mindful of her role as attorney *and* counselor at law: Although she advocates for a legally proportionate sentence, she also advises her client to consider the benefits of treatment beyond the life of the court case. It is quite possible for defense attorneys to advocate for their clients' legal rights while facilitating linkages to social services in community courts, as long as they remain mindful of their ethical moorings and the going rates.

By Way of Conclusion

At the end of the day, the community court model does not abrogate the primacy of due process and zealous advocacy in criminal matters. A recent article about alternative courts in Wisconsin sums up the point quite nicely: "Unchanged are the responsibilities to protect client confidences, to provide competent representation, including investigation of the facts and law, and to present an informed assessment of the case, enumerating the client's choices and the likely consequences of each."[19] Of course, each jurisdiction has its own practice ethos for defense attorneys, and some are certainly more zealous than others. In our experience, the style of community court you end up with is largely dictated by the planning process that went into its creation. But regardless of local differences, expanded sentencing options need not and, more importantly, *should not* attenuate procedural protections or fair process.

But that's not the whole story; community courts can actually enhance criminal defense practice. There are opportunities for zealous advocacy, to be sure, but also the resources and infrastructure for more substantive resolutions than would otherwise be possible in a traditional court setting. Why limit our notions of fairness and justice in criminal proceedings to process? Why advocate so forcefully for a robust process of determining guilt, only to then settle for such limited sentencing options as incarceration, fines, or supervision? And even for those attorneys who say, "why should I bother having my client do any services when I can get my guy off?," the question remains: Get him off to what? The revolving door of the criminal justice system? A life of crime? Untreated addiction or mental illness? As one defender poignantly reminds us, "[q]uite simply, the criminal justice system is the last stop for many clients."[20]

There are still questions to be answered, debates to be waged, charlatans to be confronted, and problems to be solved with respect to community courts and the zealous defender. This is an innovative area of practice, and as the old adage goes, nothing worth doing in life is ever easy. But whether one views the proliferation of community courts as a paradigm shift (i.e., a new way of doing business), or perhaps just a finer articulation of what the framers actually had in mind when it comes to criminal justice (i.e., a better way of doing business as usual), there is little evidence to document that they have fundamentally modified the defender's role in criminal proceedings. ■

Endnotes

1. Thomas S. Kuhn, The Structure of Scientific Revolutions 68 (3d ed. 1996).
2. *See* Nina Colman, The Friars Club Bible of Jokes, Pokes, Roasts, and Toasts 316 (2001).
3. Greg Berman, Ctr. for Court Innovation, Principles of Community Justice: A Guide for Community Court Planners 2 (2010).
4. For a comprehensive primer on community courts, see Julius Lang, Ctr. for Court Innovation, What Is a Community Court? How the Model Is Being Adapted Across the United States (2011).
5. Milliken Community Court; launched in 2011.
6. Newark Community Solutions; launched in 2011.
7. Midtown Community Court (New York, NY); launched in 1993.
8. The following examples have been carefully written to protect privacy, and all names and identifying information have been changed.
9. GED is the common abbreviation for General Education Development, an alternative to traditional high school.
10. *See, e.g.*, Mark Motivans, Bureau of Justice Statistics, Federal Justice Statistics 2009—Statistical Tables, tbl. 4.2 (rev. Jan. 26, 2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs09st.pdf.
11. Patrick McGrath, quoted *in* John Feinblatt & Derek Denckla (eds.), *Prosecutors, Defenders and Problem-Solving Courts: An Edited Transcript of a Discussion Among a Judge, Attorneys, a Court Administrator, and Academics*, 84:4 Judicature 207, 210 (2001).
12. M. Somjen Frazer, Ctr. for Court Innovation, The Impact of the Community Court Model on Defendant Perceptions of Fairness: A Case Study at the Red Hook Community Justice Center (2006).
13. Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. Rev. L. & Soc. Change 625, 631 (2006).
14. Kim Taylor-Thompson, quote *in* Feinblatt & Denckla, *supra* note 11, at 211.
15. *Id.*
16. For a more comprehensive discussion about the differences between community courts and drug courts, see Aubrey Fox, Ctr. for Court Innovation, A Tale of Three Cities: Drugs, Courts and Community Justice (2010).
17. *See, e.g.*, Nat'l Ass'n of Criminal Def. Lawyers, America's Problem-Solving Courts: The Criminal Cost of Treatment and the Case for Reform 12 (2009) (stating that "[d]rug courts seek to impose a team concept on defense lawyers, creating difficult ethical dilemmas and virtually no role for private counsel").
18. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. Rev. L. & Soc. Change 271, 300 (2009).
19. Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 Hastings L.J. 1349, 1371 (2011).
20. Steinberg, *supra* note 13, at 626.