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Access to Justice: The Promise and Pitfalls of Social Problem Solving through the Courts and Legal Advocacy

Introduction

Annette R. Appell*

The occasion for this symposium was Washington University School of Law's Ninth Annual Access to Equal Justice Colloquium, an interdisciplinary gathering, predominately of law-trained professionals and academics, but including social workers, capital defense mitigation specialists, engineers, and environmental scientists. This particular gathering, which reflected most of the law school's client-based clinics¹ and was grounded in the social aspects of legal problems—or perhaps more accurately the regulation of social problems—served as a forum to grapple with the persistence and limitations of legalistic approaches to social issues. The papers in this volume, although written by law professors, portray the promises

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1. These clinics involve a diverse array of matters and approaches, nearly all of them employing interdisciplinary personnel and approaches to teaching, representation and public policy problems. The Interdisciplinary Environmental Clinic, Intellectual Property and Nonprofit Organizations Clinic, Civil Justice Clinic, and the Criminal Justice Clinic organized panels for the colloquium.

and pitfalls in interdisciplinary approaches to problem solving and dispute resolution.

The colloquium traditionally dovetails with the school's annual year-long Public Interest Law and Policy Speakers Series. The series and the colloquium take seriously the academy's engagement with public policy and the school's commitment to critically assessing both access to and the quality of justice.² Law and Policy Speaker Professor Jane Spinak's talk, "Reforming Family Court: Getting It Right between Rhetoric and Reality," served as the keynote for the colloquium. Her talk helped frame the colloquium's focus on interdisciplinary approaches in the law. Professors Spinak, Leigh Goodmark, and Mae Quinn contributed provocative papers that individually and collectively illustrate and confront head-on the irrepressible faith in the problem-solving court, in which the judge serves as "team-leader" rather than rights protector,³ and the cyclical renewal of these courts even after, and in spite of, their failures. The papers, which are included as Articles in this volume, question the validity of these dispute resolution models the law employs to solve problems rather than adjudicate rights, particularly in the context of problem-solving courts such as family and juvenile courts, domestic violence courts, mental health courts, and criminal drug and gun

2. Organized by Karen Tokarz, Charles Nagel Professor of Public Interest Law & Public Service, the 2008–2009 series and colloquium delivered on this promise. Professor Terry Smith of Fordham University kicked off the series with a talk "Politics and Post-Racialism: Reflections on the Meaning of a Black President." Other speakers included Professor Michael Pinard, University of Maryland, speaking on "The Civil Rights Dimensions of Prisoner Reentry: the Impact on Individuals, Families, and Communities," Mary Gade, Former EPA Administrator, on "The Seven Dirty Words You Can Never Use at the EPA: Thoughts for a New Administration," Professor Philippe Sands, University College London on the "Torture Team: Rumsfeld's Memo and the Betrayal of American Values," Professor Jay Folberg, University of San Francisco, on "New Trends and Challenges in ADR Here and Around the World," New York Times immigration reporter Julia Preston, speaking on "Immigration: Enough Enforcement? The Crackdown and the Policy Options for the New Administration," Professor Goodwin Liu, University of California-Berkeley, on "The Future of Civil Rights: Reflections and Renewal," and Evan Wolfson addressed "Why Marriage Matters: America, Equality, and Gay People's Right to Marry."

3. Jane M. Spinak, *Reforming Family Court: Getting It Right between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11 (2009); Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39 (2009); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57 (2009).

courts, and even smoking courts. Each Article calls for assessment and accountability of these tribunals. That is to say the Articles call for proof, rather than stereotypes and anecdotes, that these courts actually can and do solve problems.⁴

The other two Articles provide original assessments of legal approaches to problem solving in the context of environmental justice, an area that often is more focused on group interests than individual rights. Liz Hubertz's Article analyzes the ethical obligations of interdisciplinary practice among environmental lawyers and engineers,⁵ a welcome addition to a growing interdisciplinary practice literature regarding lawyers and social workers.⁶ Helen Kang's Article addresses the flip-side of problem-solving courts: litigating problems that are so legally complex and affect so many constituents that it is difficult to identify the problem-solving mechanism, even if the problem is precisely defined.⁷ Taken together, all of the Articles illustrate the challenges and promises of interdisciplinary approaches in legal settings.

I. PROBLEM-SOLVING COURTS

Problem-solving courts were created as antidotes to, or reforms of, the punitive, legalistic, and often unresponsive approaches of civil and criminal courts to problems arising in intimate relationships, out of youthful conduct or vulnerability, and as a result of mental health issues, including drug addiction. The reforms themselves, however, inexorably present new problems that call for reform. This rhythm highlights the danger of seemingly benign, but overreaching, interventions of problem-solving courts, and it exposes the inevitable

4. Spinak calls for "systematic analysis." Spinak, *supra* note 3, at 21.

5. Elizabeth J. Hubertz, *Public Interest, Professional Bargains: Ethical Conflicts between Lawyers and Professional Engineers*, 31 WASH. U. J.L. & POL'Y 83 (2009).

6. E.g., Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 711–18 (2007); Maryann Zavez, *The Ethical and Moral Considerations Presented by Lawyer/Social Worker Interdisciplinary Collaborations*, 5 WHITTIER J. CHILD & FAM. ADVOC. 191 (2005); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic*, 7 CLINICAL L. REV. 403, 437–39 (2001).

7. Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities—Lessons from the Field*, 31 WASH. U. J.L. & POL'Y 121 (2009).

tensions of blending legal and psycho-social approaches to social problems, a combination that masks the interdependence of legal rights and therapeutic state intervention.

The juvenile courts of the late nineteenth and early twentieth centuries were perhaps the earliest problem-solving courts; the narrative power of these and subsequent generations of problem-solving courts is strong and tenacious, as Mae Quinn and Jane Spinak's Articles attest.⁸ We want to believe that there is a role for judicial intervention and regulation that is kind and gentle, and which need not be unduly constrained by individual rights. Collectively, we seem to understand that punitive and resolute adjudicative responses are inappropriate and even harmful for problems the law constructs as personal and domestic, victimless or youthful—problems such as drug use, delinquency, child neglect, and domestic violence. Yet, according to the Articles in this volume, we are unable to develop adjudicative systems that address these problems in productive, respectful, and meaningful ways. These failures and the structural challenges posed by courts that expand their reach beyond adjudicating facts and protecting rights raise difficult questions that demand further study and answers. These Articles forcefully advance this inquiry.

More fundamentally, the Articles raise questions regarding the methodological differences between social science and law (and, in the case of Liz Hubertz's Article, scientists and lawyers).⁹ These differences, all centered on the issues of assessment, present at least three quandaries or themes. One relates to the different methodologies of the law and social sciences. The second, related to the first, is the discipline of assessment, an integral aspect of science, but not of legal and dispute resolution. Third, legal approaches to assessment appear to be descriptive and at best quantitative, not qualitative.

The first quandary relates to veracity. Unlike legal studies, science, the study of social and natural problems and phenomena, is ever refining itself. Theoretical understanding or approaches to these

8. Spinak, *supra* note 3; Quinn, *supra* note 3.

9. Hubertz, *supra* note 5 (examining the different loyalties of engineers and lawyers, the former to the public and the latter to their client).

phenomena are in a constant state of assessment, refinement, and recalibration. Hypotheses are tested and may evolve into theories, which are then tested and refined, often through empirical studies. The law, however, operates through entirely different processes. It is the product of a discourse that occurs in and through democratic political and judicial processes, which have a different sort of rigor than the social sciences. Scientific assessments rarely are present in the courts, as Spinak's Article illustrates.¹⁰ Instead, the process of refinement of law and judicial systems occurs in legislatures, voting booths, and administrative agencies. It is difficult to discern non-localized peer groups that monitor and assess legal and judicial performance. The American Bar Association and other national organizations that regard courts and judges¹¹ serve normative, educational, and resource functions, but these are not scientific or peer-review bodies.

Second, and relatedly, is the quandary of accountability. While the academy has various methods of accountability—primarily peer review—the accountability for courts is often in the form of caseloads and length of time to case closure, and in some cases accountability to the public, as when judges make unpopular decisions.¹²

This limited accountability surfaces as a theme of the Articles, which highlight the failure of these problem-solving courts to take their cues from the people whose problems they purport to solve and suggest that courts should be more cognizant of and accountable to the parties before them.

Professor Spinak exposes how the elaborate and expensive efforts of the national and local bars and judicial organizations to improve the juvenile and family courts merely count and describe the

10. Spinak, *supra* note 3, at 19.

11. *E.g.*, The National Council of Juvenile and Family Court Judges, The Bureau of Justice Assistance, The National Center for State Courts, the U.S. Dept. of Health and Human Services Administration for Youth and Families.

12. *See* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 458 (2004) (“Accountability also provides a democratic check in the substantive development of the law, at least at the higher levels of the judiciary. A judge who is too liberal or too conservative, too coddling of criminals or too favorable toward the prosecution, can face criticism for those decisions and possibly sanction from the voters.”).

programs, rather than assess what value these projects are adding and whether they are in fact improving outcomes.¹³ Spinak highlights the absence of family and youth narratives regarding both the process and outcomes.¹⁴ On a more fundamental level, Spinak reveals that the question of “what value . . . the family court add[s] when it intervenes in a family’s life”¹⁵ is not assessed and does not appear to be part of the conception of court improvement.¹⁶

Similarly, Leigh Goodmark explores the difficulties inherent in developing law and policy when the theoretical and empirical understandings of social problems, such as domestic violence, are unstable—ever in the process of being assessed, refined, and updated.¹⁷ For example, judges are caught in a legal structure that characterizes domestic violence first and foremost as about physical harm and as a cycle that trains women to be passive and helpless and men to be all-controlling. Yet social scientists have identified a more fundamental and often more damaging harm than the violence itself: the loss of liberty for women in abusive relationships.¹⁸ Goodmark exposes this reductive forensic understanding of domestic violence as one that constructs women as passive victims, a model that does not necessarily reflect women’s lived experiences of and responses to domestic violence. As a result, the victim who fights back or who wishes merely to be safe, but not to separate from her abuser, is anathema to the problem-solving domestic violence court, which reductively defines the problem as removing the abuser from the woman’s life. These women’s goals may be to preserve family or keep food on the table or a roof over their heads, rather than to exile or imprison the abuser.¹⁹ Goodmark’s prescription, like Spinak’s, is to “formulate policy around the experience of” the women who do not fit the early domestic violence model of the white middle-class female victim and to develop non-paternalistic remedies based on the

13. Spinak, *supra* note 3, at 25.

14. *Id.*

15. *Id.* at 24.

16. *Id.* at 25.

17. Goodmark, *supra* note 3, at 44–45.

18. *Id.* at 43.

19. *Id.* at 46.

needs and desires of the women who petition the court for assistance.²⁰

Mae Quinn observes that there has been a proliferation (both in number and target problem-type) of criminal problem-solving courts over the past several decades, but little study of whether these courts actually help solve the problems of the litigants and what these courts cost.²¹ On the contrary, according to Quinn, the criminal defense bar was not part of the movement toward criminal problem-solving courts and has instead organized against them.²² Quinn shows that these courts were not driven by the needs of the defendants, but developed to resolve governmental problems such as jail and prison overcrowding and high judicial caseloads.²³ Yet Quinn suggests the courts may be failing even those goals, and further falling far short of the promise of rehabilitation and non-punitive treatment.²⁴

The third quandary the papers raise relates to limiting the court's reach once it becomes involved in a person's or family's life. Unlike the paradigmatic legal dispute sounding in tort, crime, or contract, where the facts are reasonably well contained and the cause of action is primarily, though not exclusively, backward-looking, the problem-solving courts start with one issue, perhaps domestic violence, child neglect, youthful lawbreaking, or drug addiction, but the intervention does not end with an adjudication; on the contrary, an adjudication that the incident occurred establishes the court's nearly unbridled dispositional power to seek to fix all sorts of even tangentially related issues.

The indeterminacy of this authority invites all manner of intervention for all types of purpose. Goodmark and Quinn explain how the unbridled (and often one-size-fits-all) intervention in domestic violence cases undermines women's autonomy and fails to meet their basic needs and wishes.²⁵ Moreover, Quinn reveals that defendants in drug courts are treated more severely and sentenced to

20. *Id.* at 47–49.

21. Quinn, *supra* note 3, at 62–68.

22. *Id.* at 64.

23. *Id.* at 63.

24. *Id.* at 65–66.

25. Goodmark, *supra* note 3; Quinn, *supra* note 3, at 68.

longer terms than those who receive justice in traditional courts.²⁶ Spinak describes the family court judge as “the leader of a team of professionals who are solving the problems of families that come to court.”²⁷ For Spinak, though, the breadth of this problem-solving outmatches the court’s ability and its authority, which should, as Spinak notes, be confined to the specific purpose that brought the family to court.²⁸

II. ENVIRONMENTAL JUSTICE

Unlike the more private and even intimate individual crimes, misdeeds, and family disputes that problem-solving courts contemplate, the problems of environmental justice are more public and involve multiple constituencies. The rights at stake relate to communities and polluters. Environmental justice contains a public accountability and responsibility that is absent from the problem-solving court narrative. Both Helen Kang and Liz Hubertz address the public aspects of the environmental justice setting. For Kang, these public aspects make it difficult to develop compelling narratives, and for Hubertz, the public aspect can create ethical complications when lawyers and engineers collaborate in the pursuit of environmental justice. In any event, these differences do not result in courts that are more hospitable to the problems of communities seeking environmental justice or more empowered litigants than exist in the problem-solving courts in criminal or family justice.²⁹

Still, environmental justice does not carry the easy and persistent narrative of the problem-solving courts, which seek to solve personal and social problems at the expense of the law. Instead, the narratives in environmental justice are legalistic, more elusive, less reductive. Helen Kang rehearses the difficulties in developing compelling environmental justice narratives because of the piecemeal and highly technical methods of resolving environmental threats, and because of

26. Quinn, *supra* note 3, at 65.

27. Spinak, *supra* note 3, at 16.

28. *Id.* at 17.

29. See Kang, *supra* note 7, at 138 (noting that courts are not the best forum for environmental justice and that lawyers often call the shots, thereby disempowering the litigants).

the multiple players involved in creating and solving environmental injustices.³⁰

Liz Hubertz's careful analysis of the difference between lawyers' and engineers' ethical obligations and professional orientations provides another perspective on the interdisciplinary approach to legal and social problems. Her focus is not on the methodologies of the professions, but instead on their ethical orientations and duties. Lawyers, she notes, have strong duties to their clients, duties that can override duties to others. Engineers' highest duty, on the other hand, is to the public, not their clients.³¹ Hubertz's analysis illustrates that these differences are not insurmountable and do not preclude engineers and lawyers from working together in pursuit of environmental or other justice,³² but these differences reflect the tensions in the problem-solving courts: the law and lawyers are heavily concerned with protecting rights, while science has a less partisan duty to what some might identify as the truth, or what others might identify as the public good. Lawyers might say their calling is to their clients' truth.

These Articles, individually and collectively, offer new, important, and critical insights into access to, and the equality of, justice, particularly for those litigants whose limited social and economic power and authority propel them to courts to resolve problems that might for others be informally negotiated. These insights should inform and guide assessment of what problems courts are competent to resolve and what should be the reach of their jurisdiction over the lives of individuals, families, and communities.

30. Kang, *supra* note 7, at 139.

31. Hubertz, *supra* note 5.

32. *Id.* at 104–19.