

## FAMILY COURT AS PROBLEM SOLVING?

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Problem-solving courts seek to find new responses to social, human, and legal problems, often through the integration of treatment programs that modify the behavior of litigants. Focusing on child support enforcement proceedings in family court, this Essay asks if legal actors understand these cases as adversarial, non-adversarial, or problem solving. This project draws from original, in-depth qualitative interviews with an array of legal actors—including judges, family court commissioners, child support attorneys, and defense attorneys. Findings reveal that legal actors see both adversarial and non-adversarial features in child support enforcement proceedings. However, as they develop personal and potentially conflicting orientations toward their work, litigants bear the consequences. Legal actors' suggestion that the adversarial nature of cases can be minimized may deny litigants the opportunity to zealously advocate for their position—either in the form of effective self-representation or by acquiring an attorney. Legal actors' competing understandings of the problems underlying the nonpayment of support also suggest that litigants do not derive the full benefits of a problem-solving model. Connections to services around job access, educational attainment, expungement, transportation, and other structural issues are irregularly or partially institutionalized. Variation in legal actors' approaches

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to these cases may undermine both the rights and protections of the adversarial model and the service provision of the problem-solving model.

Introduction .....	1538
I. Child Support Enforcement in Poor Families: An Overview.	1540
II. Research Methodology.....	1544
III. Problem-Solving Courts Literature Review .....	1546
A. Shifting Roles of Legal Actors .....	1547
1. The Role of the Judge .....	1547
2. The Role of Defense Counsel.....	1548
3. The Role of the Prosecutor and Other Actors .....	1551
B. Behavior Modification in Problem-Solving Courts.....	1552
1. Interpretive Practices .....	1553
C. Addressing Poverty in Problem-Solving Courts .....	1554
IV. Family Courts and Problem-Solving Logic.....	1556
A. Proceedings as Adversarial .....	1559
B. Problem Solving Individual Problems .....	1563
C. Problem Solving Structural Problems.....	1566
Conclusion .....	1567

#### INTRODUCTION

To what extent are family courts “problem solving” versus adversarial? Problem-solving courts explicitly strive to move away from adversarial court proceedings and to address chronic social problems.<sup>1</sup> This effort often involves collaborative relationships between legal actors and the integration of extra-legal services and resources into the court process.<sup>2</sup> Family law courts have incorporated therapeutic orientations and an activist judicial role, common features in problem-solving models.<sup>3</sup> These features aim to positively impact the individuals, children, and families involved in court proceedings. Yet, family courts do not fall under the umbrella of problem-solving courts. And they are characterized by potentially competing interests—those of the custodial parent, the noncustodial parent, the child, and the state. Formally, these proceedings are part of an adversarial system in which opposing parties present their positions before a neutral arbiter, who determines the outcome. Given these tensions, whether family court is more problem

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1. See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL’Y 125, 125–26 (2001).

2. See Ursula Castellano, *Problem-Solving Courts: Theory and Practice*, 5 SOCIO. COMPASS 957, 958–59 (2011).

3. Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 113, 114, 124 (2010).

solving or adversarial may be contextual and contingent upon how legal actors define the process and how litigants experience it.

It is worth noting that drawing a sharp line between adversarial proceedings and non-adversarial or problem-solving ones may present a false dichotomy. Problem-solving courts are still embedded in an adversarial system<sup>4</sup> and adversarial proceedings seek to solve problems insofar as parties and decisionmakers ultimately aim to find resolution to a dispute.<sup>5</sup> Most legal processes combine aspects of both adversarial and non-adversarial practice to varying degrees. Yet, the adversarial system and problem-solving courts both rely on distinct features that may be in tension with each other.

The adversarial system involves an open process where all affected parties have the opportunity to present their own case and refute an opposing party's case before a neutral arbiter. Key features include self-initiation of the suit by the parties (either by civil litigants or by public prosecutors), parties' responsibility to present evidence, and an impartial and passive judge who makes an objective decision insofar as it is based on the evidence and argument presented by the parties. As a framework, the adversarial system limits the scope of reach of the state, in that cases are initiated by the parties who direct the proceedings. The emphasis on zealous advocacy aims to protect individual rights and freedoms.<sup>6</sup>

By contrast, problem-solving models seek to find new responses to social, human, and legal problems, often through the integration of treatment programs that modify the behavior of litigants.<sup>7</sup> They rely on a collaborative, team approach that centers non-adversarial adjudication and hands-on judicial involvement. Notably, these programs have been critiqued as expanding the role of the state.<sup>8</sup> For instance, in their study of one of the treatment facilities associated with a drug court program—one of the most popular forms of problem-solving court<sup>9</sup>—Gowan and Whetstone suggest that the integration of therapeutic logic into the criminal justice proceedings allows the state to engage in a project of

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4. See JANE DONOGHUE, *TRANSFORMING CRIMINAL JUSTICE?: PROBLEM-SOLVING AND COURT SPECIALISATION* 4 (2014).

5. See William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631, 639 (1980–81).

6. DONOGHUE, *supra* note 4, at 42; Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 318 (1989).

7. See Castellano, *supra* note 2, at 958–59.

8. See *id.* at 962.

9. *Id.* at 957.

identity reform that “re-socializes far more intensively than most forms of incarceration.”<sup>10</sup>

Focusing on child support proceedings in family court, this Essay asks if legal actors and litigants in such cases understand them as problem solving or adversarial. These are an interesting empirical site of investigation because legal actors may have wide-ranging perspectives on the goals and mechanisms of the enforcement process. In child support, the interests of the custodial parent, the noncustodial parent, the child, and the state all come into play. Parties may also have divergent perspectives on the underlying reasons for non-payment. The identification of “problems” and corresponding solutions can suggest very different methods of handling these cases.

This Essay asks if legal actors in child support enforcement understand these cases as adversarial, non-adversarial, or problem solving. If they are understood as adversarial, who are the adversaries and how do their interests compete or converge? If they are understood as problem solving, who or what constitutes the “problem” and what can the legal process offer as corresponding solutions? To answer these questions, this project draws from original empirical data drawn from interviews with child support litigants and interviews with an array of legal actors—including judges, family court commissioners, child support attorneys, and defense attorneys. Their perspectives are supplemented with ethnographic data from observations of court hearings. Whether those involved in child support proceedings see them as problem solving or adversarial can structure the identification of the foundational issues in child support cases, the relations amongst legal actors and litigants, and the construction of the role that the legal system plays in litigants’ lives.

## I. CHILD SUPPORT ENFORCEMENT IN POOR FAMILIES: AN OVERVIEW

This Part begins with an overview of the legal background and setting for this study. Child support enforcement in the context of poor families has been a subject of debate and criticism.<sup>11</sup> The child support enforcement system in the United States operates under the aegis of the

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10. Teresa Gowan & Sarah Whetstone, *Making the Criminal Addict: Subjectivity and Social Control in a Strong-Arm Rehab*, 14 PUNISHMENT & SOC’Y 69, 87 (2012). *Accord* Berman & Feinblatt, *supra* note 1, at 126, 128; Castellano, *supra* note 2, at 960.

11. *See, e.g.*, Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 229 (2000) [hereinafter Brito, *Welfarization*]; Tonya L. Brito, *The Child Support Debt Bubble*, 9 U.C. IRVINE L. REV. 953, 954–55 (2019) [hereinafter Brito, *Debt Bubble*]; Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 928–29 (2016).

Title IV-D program, authorized by Title IV-D of the Social Security Act.<sup>12</sup> This program is a collaborative effort involving federal, state, local, and tribal governments.<sup>13</sup> State child support enforcement agencies bear the responsibility for a range of activities, including locating absent parents, establishing paternity, and enforcing child support orders.<sup>14</sup> The key stakeholders in this system include government attorneys, judges, custodial parents, noncustodial parents, and, to a lesser extent, defense attorneys.<sup>15</sup>

The state's stake in IV-D cases is multifaceted, often yielding conflicting interests.<sup>16</sup> Notably, government attorneys in IV-D cases represent the state's child support enforcement agency and not the parents involved.<sup>17</sup> States aim to enforce child support orders to ensure that custodial parents receive financial support and simultaneously seek to recover the expenses of public welfare previously extended to them.<sup>18</sup> In numerous instances, the child support collected primarily serves as reimbursement to the state, rather than direct financial assistance to the

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12. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351-58 (1975) (codified as amended at 42 U.S.C. §§ 651-60). As part of this partnership, the federal government provides funding to state and tribal child-support agencies, and the federal Office of Child Support Enforcement provides oversight and guidance. *Id.*

13. *Id.*

14. Brito, *Welfarization*, *supra* note 11, at 254, 261.

15. Few litigants in IV-D child support cases are represented by counsel. One study found that only 15.4% of sample fathers and 12.1% of sample mothers had attorney representation, and both parents were represented in only 6.5% of cases. Additionally, only 8.8% of the poorest fathers in the sample were represented. Margaret F. Brinig & Marsha Garrison, *Getting Blood from Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 FAM. CT. REV. 521, 536 (2018).

16. See Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1031-34 (2007).

17. See Stacy Brustin & Lisa Martin, *Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents*, 67 HASTINGS L.J. 1265, 1269 (2016); Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2734-35 (2014).

18. Federal law requires custodial parents who receive public aid to assign to the state their right to collect child support as a condition for receiving such assistance, and the state then brings child-support actions against noncustodial parents to reimburse itself for the welfare payments made to the custodial parent. See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617, 659-60 (2012) [hereinafter Brito, *Fathers Behind Bars*].

custodial parent and children.<sup>19</sup> Additionally, this practice often occurs at the expense of the economically disadvantaged noncustodial parent.

Child support orders are established pursuant to state-specific guidelines—essentially mathematical formulas that determine the order amount based primarily on parents' income and the number of children included in the order. However, economically disadvantaged fathers frequently face child support orders that are disproportionately large relative to their limited earnings and unstable employment.<sup>20</sup> These orders often consume a significantly larger portion of their income compared to their more financially stable counterparts.<sup>21</sup> Several systemic practices intrinsic to the establishment, modification, and enforcement of child support orders exacerbate this disparity:

1. *Default Orders*: A significant number of child support orders are established by default when noncustodial parents fail to appear in court.<sup>22</sup>
2. *Imputed Income*: Orders are often calculated based on imputed income, assuming that the noncustodial parent could secure stable, full-time employment at minimum wage, rather than on their actual earnings.<sup>23</sup>
3. *Retroactive Debt*: Noncustodial parents frequently find themselves in debt for retroactive support and additional state-incurred costs, such as birth expenses.<sup>24</sup>

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19. See Hatcher, *supra* note 16, at 1045 (“Successful collections of the assigned child support are generally kept by the state and federal governments to reimburse the cost of providing welfare assistance.”).

20. See Brito, *Fathers Behind Bars*, *supra* note 18, at 634.

21. Federal law permits a maximum withholding limit of 50% to 65% of earnings for child support payments. *Processing an Income Withholding Order or Notice*, OFF. CHILD SUPPORT SERVS., U.S. DEP'T HEALTH & HUM. SERVS., <https://www.acf.hhs.gov/css/resource/processing-an-income-withholding-order-or-notice> [<https://perma.cc/B366-E3QC>] (Nov. 30, 2022). A 2002 federal report revealed that the child support orders of low-income obligors were, on average, 69% of their reported earnings, despite the federal limit. This exceeds the national average of 40%. Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, JUDGES' J., Winter 2004, at 5, 5.

22. Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145, 153 (2020) [hereinafter Brito, *Four Models*].

23. *Id.* at 153–54.

24. *Id.* See also Vicki Turetsky, *Realistic Child Support Policies for Low Income Fathers* 8 (Mar. 2000) (unpublished working paper) (on file with the Center for Law and Social Policy).

4. *Lack of Timely Modifications*: Orders often remain unchanged even when noncustodial parents experience a reduction in income.<sup>25</sup>
5. *Multiple Orders*: For those with multiple child support orders, the cumulative financial obligation can be overwhelming, sometimes reaching up to sixty-five percent of pretax earnings.<sup>26</sup>

These practices, collectively, contribute to the pervasive problem of child support nonpayment and the accumulation of substantial arrears by low-income noncustodial parents.<sup>27</sup>

There is widespread agreement that the child support enforcement system is failing low-income families.<sup>28</sup> The system is characterized by low collection rates for custodial mothers and high debt accrual for noncustodial fathers,<sup>29</sup> the majority of whom are “unable nonpayers” who genuinely lack the means to fulfill their support obligations.<sup>30</sup> Despite this, the state continues to aggressively enforce child support orders, often resulting in unjust outcomes and exacerbating poverty among these families.<sup>31</sup>

The legal repercussions for nonpayment of child support can be severe. Indebted fathers frequently find themselves ensnared in a series of court hearings, which grow progressively punitive. These hearings often commence with seek-work orders, which mandate job-seeking efforts,<sup>32</sup> and can escalate to findings of civil contempt and even imprisonment.<sup>33</sup> Consequently, “child support law treats support

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25. Brito, *Four Models*, *supra* note 22, at 154.

26. *Id.*

27. *Id.* at 153–54.

28. See Brito, *Debt Bubble*, *supra* note 11, at 957 n.14.

29. See generally Brito, *Fathers Behind Bars*, *supra* note 18 (showing that noncustodial fathers, especially when incarcerated, accrue debt for a variety of reasons and thereby custodial mothers do not collect).

30. *Id.* at 633.

31. See *id.* at 633, 643–46.

32. Child support law in most states include work requirements. Noah D. Zatz & Michael A. Stoll, *Working to Avoid Incarceration: Jail Threat and Labor Market Outcomes for Noncustodial Fathers Facing Child Support Enforcement*, 6 RSF: RUSSELL SAGE FOUND. J. SOC. SCIS. 55, 57 (2020). For example, WIS. STAT. § 49.36 governs seek-work orders from the court. WIS. STAT. § 49.36 (2021–22). The Wisconsin Department of Children and Families provides further guidance for court orders to seek work: “As an alternative to imputed income, the court may order the parent who is not a custodial parent to search for a job or participate in a work experience and job training program . . . under s. 49.36, Stats.” WIS. ADMIN. CODE DCF § 150.03(3) (2021–22).

33. See Brito, *Fathers Behind Bars*, *supra* note 18, at 617–19, 650–55. State child-support agencies initiating civil contempt actions against obligors contend that their

obligations as creating a duty to earn enough to pay, not just to pay enough of what one earns.”<sup>34</sup> This perspective is further entrenched by courts interpreting a noncustodial parent’s unemployment as a deliberate refusal to pay child support.<sup>35</sup> The practice of incarcerating fathers unable to pay, often labeled as “deadbroke,” has garnered widespread criticism, with many likening it to contemporary debtor’s prison.<sup>36</sup>

## II. RESEARCH METHODOLOGY

This qualitative research delves into the intricacies of the experiences of low-income litigants within the family court setting, with a specific lens on child support enforcement actions. The methodology employed entails a comprehensive exploration of the legal processes within these cases. This involves an in-depth examination of court interactions, scrutinized through the diverse perspectives of involved individuals, including family members, legal representatives, and judicial decisionmakers. To grasp a holistic understanding, the study embraces an extended timeframe, during which participants’ cases are observed. The aim is to unravel how self-represented litigants comprehend and navigate the court system, their efficacy in self-representation, and the significance of legal representation in these scenarios.

Earlier scholarly publications stemming from this research provide detailed and comprehensive explanations of the study’s research methodology. For the sake of brevity, a condensed version of these methodological details is presented here.<sup>37</sup> Over a span of five years, our research team diligently collected data across six counties spanning two Midwestern states. To ensure participant confidentiality, pseudonyms are assigned to individual names and locations. In this framework, the two states are designated as State A and State B.<sup>38</sup> Data collection across the

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nonpayment of support is a willful violation of a child-support order, meaning that the obligor could pay the order but chooses not to. In these actions, incarceration is civil, not criminal, and is a remedy intended to coerce the obligor/contemnor to comply with the child-support order rather than to punish them for the violation. *See Brito, Debt Bubble, supra* note 11, at 965 n.62.

34. Zatz & Stoll, *supra* note 32, at 56.

35. *See Zatz, supra* note 11, at 934.

36. Brito, *Debt Bubble, supra* note 11, at 954, 966.

37. For a more detailed account of the ethnography conducted in this study, see Tonya L. Brito, Daanika Gordon & David J. Pate Jr., *Focused Ethnography: A Methodological Approach for Engaged Legal Scholarship*, in *LEGAL SCHOLARSHIP FOR THE URBAN CORE: FROM THE GROUND UP* 141, 143–44 (Peter Enrich & Rashmi Dyal-Chand eds., 2019), and Brito, *Four Models, supra* note 22, at 162–72.

38. Within each state, we concentrated our data collection in three counties, which were chosen because their family courts vary in size and urbanicity, and because they serve communities with varying levels of racial, ethnic, and economic diversity.



six counties encompasses exploratory fieldwork, ethnographic observations of child support enforcement hearings, and over 145 in-depth group and individual interviews. These interviews involve lawyers, litigants, and judges, all of whom are central to child support proceedings. The insights gained from legal actors shed light on the functioning of civil justice within child support enforcement cases, unraveling decisionmaking processes and the rationale behind them. Additionally, the study encompasses interviews with stakeholders from organizations crucial to the child support process at both state and federal levels. These include representatives from jobs programs, courthouse librarians aiding unrepresented litigants, and directors of state child support agencies.

The research approach was further enriched by soliciting the experiences of litigants from their unique vantage points. We collected longitudinal data from a cohort of forty noncustodial fathers, who were defendants/obligors in child support cases. This involved an initial in-depth interview, continuous monitoring of their cases for a year, and a follow-up interview at the year's conclusion. To gather a holistic understanding, in-depth, semi-structured interviews were conducted with eight custodial parent mothers embroiled in child support enforcement cases, capturing their experiences and subjective interpretations of the child support process.

Supplementing this, an extensive ethnographic examination of child support enforcement adjudication was undertaken. This judicial process involved a judicial officer (judge or family court commissioner), a government attorney representing the child support enforcement agency, and the parents. Our observations revealed that custodial parents were predominantly mothers, while defendants were typically low-income Black fathers within the counties under scrutiny. While defense counsel were infrequently present during observed hearings, they were occasionally appointed or retained to represent defendants in enforcement actions.<sup>39</sup> The ethnographic facet of the research unveiled the

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39. The infrequent presence of defense counsel in these cases is unsurprising in light of the overall low rates of representation in family law cases. See Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389, 1391–92 (2016). Also, many obligors in the cases observed were low- or no-income and unlikely to have the resources to hire an attorney, and there is no constitutional right to representation in child support cases, even for poor individuals. See Tonya L. Brito, David J. Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 225–28 (2016). In State A, however, the law allows for appointment of counsel for obligors only in contempt actions where there is a risk of civil incarceration. Even though counsel was purportedly available to eligible obligors, the research team rarely observed defense counsel in contempt actions.

construction of social meaning within the framework of a specific legal process. The study delved into the narratives and legal strategies employed by legal professionals and litigants to reach conclusions regarding a noncustodial parent's capacity to fulfill support obligations.

The methodology for data analysis is guided by a critical perspective that aims to uncover, document, and address systemic inequities. This critical qualitative lens scrutinizes power dynamics, both overt and covert, as well as unjust societal conditions that marginalize certain individuals and communities.<sup>40</sup> This stands in contrast to conventional social science research, which often, through claims of impartiality, ends up reinforcing existing power structures.<sup>41</sup> Critical inquiry here delves into issues of race, gender, socioeconomic status, and their complex interactions, as well as the processes through which systemic injustices become institutionalized.

Our data analysis is underpinned by grounded theory. This involves a recurrent process of open coding, focused coding, and analytical memo writing, culminating in the development of theory.<sup>42</sup> Our approach to focused coding is characterized by a multistage process that thrives on collaborative effort and ongoing dialogue. While labor-intensive, this approach bolsters reliability by exposing the data to multiple interpretations. The analysis process is characterized by iteration, collaboration, and introspection, which collectively facilitate a progressively intricate and contextually rich understanding of the research questions at hand.<sup>43</sup>

### III. PROBLEM-SOLVING COURTS LITERATURE REVIEW

This brief review covers the literature on problem-solving courts relevant to understanding the nature of child support enforcement hearings. Problem-solving courts explicitly strive to move away from adversarial court proceedings and “to forge new responses to chronic social, human, and legal problems.”<sup>44</sup> This kind of logic is present in

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40. See Brito, Gordon & Pate, *supra* note 37, at 148.

41. See Jeff Rose, *Ethnographic Research for Social Justice: Critical Engagement with Homelessness in a Public Park*, in *FOSTERING SOCIAL JUSTICE THROUGH QUALITATIVE INQUIRY* 129, 129–32 (Corey W. Johnson & Diana C. Parry eds., 2015).

42. See generally KATHY CHARMAZ, *CONSTRUCTING GROUNDED THEORY: A PRACTICAL GUIDE THROUGH QUALITATIVE ANALYSIS* (2006) (describing the grounded theory process in detail); Iddo Tavory & Stefan Timmermans, *A Pragmatist Approach to Causality in Ethnography*, 119 *AM. J. SOCIO.* 682 (2013).

43. See generally Rose, *supra* note 41.

44. Berman & Feinblatt, *supra* note 1, at 126.

many family court reform efforts.<sup>45</sup> The problem-solving model raises a number of issues, as it transforms both the means and the ends to which legal processes have been put. This review addresses the shifting roles of legal actors in problem-solving courts, the behavior modification strategies they employ, efforts to address issues of poverty, and the existing parallels between problem-solving courts and approaches to family law matters.

### A. Shifting Roles of Legal Actors

Problem-solving courts are premised on a collaborative approach. Actors from the legal system and social service agencies form an interdisciplinary “team” that collectively treats and monitors program clients. Castellano describes these teams as: “composed of a diverse set of actors, including judges, social service workers, attorneys, and probation officers. The team meets on a routine basis to process new referrals and collectively discuss participants’ progress.”<sup>46</sup> This team approach transforms the roles of the legal actors involved through the expectation that they deftly manage both legal and treatment imperatives.<sup>47</sup> The non-adversarial orientation of problem-solving courts results in new forms of interaction among legal actors and between legal actors and clients.

#### 1. THE ROLE OF THE JUDGE

The role of the judge is dramatically transformed in the context of problem-solving courts. Reviewing the literature on drug treatment courts, Burns and Peyrot note that “judges shed their usual detached neutrality to adopt much more active roles in the proceedings. Judges interact directly with defendants (called “clients”) from the bench, with the overriding aim of curing them of their illegal addictions.”<sup>48</sup> During review hearings, the judge takes a preeminent role in monitoring clients, engaging with each individually and delivering sanctions and rewards aimed at cultivating progress through the program. Judges become team

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45. See, e.g., Barbara A. Babb, *Family Courts Are Here to Stay, so Let's Improve Them*, 52 FAM. CT. REV. 642, 644 (2014).

46. Castellano, *supra* note 2, at 959.

47. Kimberly M. Baker, *Decision Making in a Hybrid Organization: A Case Study of Southwestern Drug Court Treatment Program*, 38 LAW & SOC. INQUIRY 27 (2013).

48. Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 418 (2003) (citation omitted).

leaders, “focused on rehabilitative goals through collaborative processes.”<sup>49</sup> They also often play a substantial part in establishing and institutionalizing problem-solving courts.

Critics of the problem-solving model suggest that this new role of the judge compromises judicial impartiality and due process protections. Castellano summarizes: “In the problem-solving courtroom, judges take on the informal role of treatment facilitators rather than legal arbiters. These activities include fundraising, actively investigating cases, and mak[ing] personal appeals on behalf of participants, which infringe upon judicial impartiality.”<sup>50</sup> This possibly blurs the separation of powers by positioning judges as policymakers.<sup>51</sup> The collaborative model may also enhance the possibility of ex parte communication, as judges interact with litigants and with service providers who give input on cases outside of the courtroom.<sup>52</sup> Berman and Feinblatt identify a number of tensions raised by the problem-solving model, many of which implicate the role of the judge.<sup>53</sup> They describe issues around structure and suggest that, on the one hand, these courts may empower judges to make decisions based on “their own idiosyncratic worldviews,” or, on the other, may limit judicial discretion through systematic rules governing the imposition of sanctions and rewards.<sup>54</sup> They also suggest that problem-solving courts may foster paternalism, as judges have the capacity to “impos[e] treatment regimes on defendants without reference to the complexity of individuals’ problems.”<sup>55</sup>

## 2. THE ROLE OF DEFENSE COUNSEL

Problem-solving courts complicate the role of defense counsel. While counsel is still expected to ensure due process for clients, they are also expected to encourage full program participation. Hora, Schma, and Rosenthal elaborate, specifically in relation to the drug court: “With the consent of the defendant, the [Drug Treatment Court’s] goal becomes recovery from addiction and not the exercise of the full panoply of the

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49. Shannon Portillo, Danielle S. Rudes, Jill Viglione & Matthew Nelson, *Front-Stage Stars and Backstage Producers: The Role of Judges in Problem-Solving Courts*, 8 VICTIMS & OFFENDERS 1, 18 (2013).

50. Castellano, *supra* note 2, at 962 (citation omitted).

51. Berman & Feinblatt, *supra* note 1, at 134–35.

52. Leonard Edwards, *Ethical Issues in the Family Drug Treatment Court*, JUV. & FAM. CT. J., Winter 2013, at 1, 1, 15.

53. Berman & Feinblatt, *supra* note 1, at 131–32, 134–35.

54. *Id.* at 134.

55. *Id.*

defendant's rights."<sup>56</sup> This departure from the role of the zealous advocate raises a number of concerns over which there has been debate. Quinn summarizes five key issues around the role of defense in the drug court context:

1. *Waiving the rights of the defendant*: Entering into a problem-solving court program generally requires pleading guilty to a criminal charge and waiving certain rights of due process. Attorneys must ensure that clients are making a truly knowing, voluntary, and intelligent decision, which is challenging if the parameters of participation are not explicitly laid out.<sup>57</sup>
2. *Collaborating with other drug court players*: Defense attorneys are expected to work with the prosecution toward the client's best interest. However, prosecutorial discretion shapes many aspects of these programs, while "individual defense attorneys wield no more power in drug courts than they do in an ordinary courtroom setting."<sup>58</sup>
3. *Case dumping*: Prosecutors may use problem-solving courts as a place to dump weak cases. While this is difficult to demonstrate, it remains a concern. Defense counsel can do little to thwart this other than to advise individual clients not to enter a guilty plea.<sup>59</sup>
4. *Proving the need for treatment*: In some cases, clients who are too afflicted with other problems, such as mental health issues or lack of stable housing, may be rejected because the program does not have the capacity to provide treatment. Defense counsel can face the dilemma of downplaying these other issues to assist a client in avoiding a felony conviction.<sup>60</sup>
5. *Treatment too onerous*: Drug court participation can place requirements on litigants that are more onerous than traditional adjudication. In addition, clients often must agree to a harsher sentence as a condition of failure in the

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56. Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *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, 480 (1999).

57. Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 54-56 (2000-01).

58. *Id.* at 58.

59. *Id.* at 58-59.

60. *Id.* at 60-61.

program than they would otherwise receive. In advising clients in relation to these risks, defense attorneys “may be gambling with a client’s future without sufficient information.”<sup>61</sup>

Quinn also addresses the role of defense counsel during the regular status meetings of the drug treatment court. Based on her experience as counsel in the Bronx Drug Treatment Court, Quinn describes an informal culture during status hearings that suggests that the presence of defense counsel is unnecessary.<sup>62</sup> However, Quinn argues, “as status hearings might be viewed as incremental components of the sentencing hearing, courts should ensure that cases are not handled without defense counsel present to provide the client with advice and counsel.”<sup>63</sup> Quinn also suggests that the right to effective representation should encourage treatment courts to develop a sounder evidentiary hearing process before imposing sanctions.<sup>64</sup>

Spinak corroborates many of Quinn’s critiques in identifying potential sources of reservation that defense counsel may feel in relation to problem-solving courts.<sup>65</sup> She cites the financial control of these programs that judges and prosecutors retain, the heterogeneity of opinions within defenders’ offices regarding the norms and structures of problem-solving courts, and general wariness regarding other legal actors’ ability to perceive clients holistically and to sustain commitment to these projects over time.<sup>66</sup>

While scholars and practitioners raise concerns about moving defense counsel away from the role of zealous advocate, Goldman suggests that problem-solving courts can facilitate an attorney’s ability to fulfill their professional obligation.<sup>67</sup> Goldman analyzes mental health courts, arguing that American Bar Association Model Rule 1.14—which mandates that attorneys who represent clients with diminished capacities take “reasonably necessary protective action” on the client’s behalf<sup>68</sup>—*cannot* effectively accomplish this in a traditional courtroom.<sup>69</sup> Goldman

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61. *Id.* at 62.

62. *Id.* at 64.

63. *Id.* at 69.

64. *Id.* at 73.

65. See Jane M. Spinak, *Why Defenders Feel Defensive: The Defender’s Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1618–20 (2003).

66. *Id.*

67. Julie Goldman, *The Need for Mental Health Courts for Lawyers to Fulfill Their Duties Under ABA Model Rule 1.14*, 26 GEO. J. LEGAL ETHICS 683, 684 (2013).

68. *Id.* at 689 (quoting MODEL RULES OF PRO. CONDUCT r. 1.14(b) (AM. BAR ASS’N 2012)).

69. *Id.* at 689–91.

advocates for mental health courts in every jurisdiction to ensure due process for mentally ill clients.<sup>70</sup> Kempinen suggests that the role of defense counsel in problem-solving courts should not be measured in relation to their duties within an adversarial model.<sup>71</sup> Instead, the evolving role of defense counsel should emerge from the empirical realities of work in a non-adversarial setting.<sup>72</sup> Based on a review of the work of problem-solving courts in Wisconsin, Kempinen suggests three roles that defense counsel can play in the problem-solving court context: “(1) as a member of the problem-solving court planning or advisory group, (2) as a member of the problem-solving court treatment team, and (3) as a lawyer for an individual client.”<sup>73</sup>

### 3. THE ROLE OF THE PROSECUTOR AND OTHER ACTORS

The state—through the district attorney’s office—often retains substantial power in designing diversionary programs, defining eligibility criteria, selecting cases, and ultimately making a determination regarding case disposition. The Department of Justice outlines the role of the prosecutor in its description of best practices in drug court, elaborating: “The responsibility of the prosecuting attorney is to protect the public’s safety by ensuring that each candidate is appropriate for the program and complies with all drug court requirements.”<sup>74</sup> While prosecutors may not play an active role during the regular review of cases, they nevertheless represent the interests of the state, shaping problem-solving court programs and channeling clients into or out of diversionary options. They thus structure the kind of clientele who come into the problem-solving court setting. As Castellano summarizes, this can lead to “creaming” practices, where clients who are referred to problem-solving courts are those “deemed most likely to respond positively to their services rather than those most impaired.”<sup>75</sup> This can reproduce structural inequalities when degree of impairment systematically varies by race, class, or gender. Quinn suggests that the emphasis on collaborative teamwork in problem-solving courts can be misguided, writing, “[l]ike other

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70. *Id.* at 690–91.

71. Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349, 1352–53 (2011).

72. *Id.* at 1375.

73. *Id.* at 1353.

74. BUREAU OF JUST. ASSISTANCE, U.S. DEP’T OF JUST., NCJ 205621, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997).

75. Castellano, *supra* note 2, at 962.

diversionary programs, most drug treatment courts operate at the whim of the prosecution.”<sup>76</sup>

Other actors also play a role in problem-solving courts. In drug courts, case managers or clinical coordinators often participate in review hearings and monitor clients through the various treatment activities required by the program. Based on ethnographic fieldwork within five problem-solving courts (three drug courts and two reentry courts), Portillo, Rudes, Viglione, and Nelson find that probation officers play a central role outside of the courtroom environment.<sup>77</sup> While the judge appears preeminent during the weekly review, in meetings between the team, the judge will defer to probation officers, who monitor and report on participants’ progress and provide recommendations around sanctions and incentives. The collaborative nature of problem-solving courts suggests that many actors must negotiate their new roles in this context. Critics bring attention to the legal repercussions of these changes and research on problem-solving courts has been attuned to power dynamics amongst members of the professional team and between professionals and clients.<sup>78</sup>

### *B. Behavior Modification in Problem-Solving Courts*

Many problem-solving courts rely on a system of sanctions and rewards in order to modify clients’ behavior. Burns and Peyrot describe this system as one of “tough love,” explaining through the case of a drug court the “dual message to defendants that while the criminal justice system cares about helping them overcome their addiction problems, it also requires defendants to be responsible and accountable.”<sup>79</sup> Bozza characterizes these efforts, writing, “[f]or the most part, they rely on the application of rudimentary principles of operant conditioning to control behavior.”<sup>80</sup> In many drug courts, the judge metes out rewards and sanctions during the weekly review. Rewards, which may include praise from the judge, tokens for sobriety thresholds, or entry into a raffle for a gift card prize are distributed with meaningful indicators of progress such as clean drug tests or passage to the next stage of the program.<sup>81</sup> Clients receive sanctions, generally in the form of a short time in jail

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76. Quinn, *supra* note 57, at 57.

77. Portillo, Rudes, Viglione & Nelson, *supra* note 49, at 17–18.

78. *Id.* at 2, 6–7.

79. Burns & Peyrot, *supra* note 48, at 433.

80. John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 97 (2007).

81. See NAT’L ASS’N DRUG CT. PROS., ADULT DRUG COURT BEST PRACTICE STANDARDS 26 n.13 (2018).



(one to three nights), when they are not in compliance with program requirements.<sup>82</sup> The collective nature of the “intensive monitoring” that is a frequent feature of problem-solving courts is integral to behavior modification efforts. The judge distributes rewards and sanctions in front of an audience of many clients; the attendant feelings of pride and shame that such a collective review fosters are themselves intended to encourage program compliance. The National Association of Drug Court Professionals emphasizes that this system of incentives and sanctions must be “predicable, fair, consistent, and administered in accordance with evidence-based principles of effective behavior modification.”<sup>83</sup> The association outlines best practices that include using jail sparingly, incentivizing productivity, and, despite aiming for consistency, maintaining professional discretion over the use of sanctions.<sup>84</sup>

Gowan and Whetstone explore the consequences of these behavior modification efforts, describing the merging of legal and therapeutic logics as the “‘fuzzy edge’ of the criminal justice system.”<sup>85</sup> They ethnographically examine a rehabilitation facility associated with the drug court and argue that this kind of hybrid program “re-socializes far more intensively than most forms of incarceration.”<sup>86</sup> Gowan and Whetstone explain that the disease model operates as a “biological, and supposedly universal construct that reduces poverty and racial exclusion to a product of addict psychopathology.”<sup>87</sup> While professionals no longer focus on criminality, but on addiction as a disease, this trope retains the same capacity to divorce social problems from their systemic roots and to identify the individual as the ultimate locus of change.

## 1. INTERPRETIVE PRACTICES

In order to evaluate clients’ progress through treatment programs, court professionals engage in a number of interpretive practices. These efforts are designed to evaluate the authenticity of participants’ identity transformations. Burns and Peyrot take the case of a drug court and describe the frames that team members use in evaluating clients, suggesting that certain members are deemed unsuitable for participation, which facilitates the conservation of scarce treatment resources.<sup>88</sup> They identify as unsuitable clients who are in denial of their addiction, who

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82. *See id.*

83. *Id.* at 26.

84. *Id.* at 26, 28.

85. Gowan & Whetstone, *supra* note 10, at 87.

86. *Id.*

87. *Id.*

88. Burns & Peyrot, *supra* note 48, at 423–24.

understand themselves as victims of unfair treatment by program staff, or who lack the incentive to change.<sup>89</sup> In contrast, successful clients are those that acknowledge their addiction and demonstrate their commitment to recovery.<sup>90</sup> The drug court program ends with a graduation ceremony that “amounts to an elaborate reintegration ceremony,” signaling the client’s return to the moral community.<sup>91</sup>

Paik has extensively studied the interpretive practices that occur within multiple sites of supervision in the drug treatment court process.<sup>92</sup> In an ethnographic study of an adult residential drug treatment facility, Paik finds that staff link clients’ displays of emotion during group sessions to constructs of an addict identity.<sup>93</sup> Believing that clients are reluctant to express emotions other than anger, staff are more likely to favorably view other emotional expressions as reflections of the client’s “true” self and their commitment to the identity of “recovering dope fiend.”<sup>94</sup> In separate studies, Paik explores the interpretation of drug test results and the ways in which drug court staff reconcile accountability with mental health issues.<sup>95</sup> This body of work illustrates that evaluating program compliance is based on a number of measures that are themselves socially constructed and open to competing interpretations.

### C. Addressing Poverty in Problem-Solving Courts

Problem-solving courts are treatment focused. They “develop individualized treatment plans for each participant to address their unique life circumstances.”<sup>96</sup> Through the collaborative approach, legal actors identify and work closely with social service providers who address the underlying problems that potentially contributed to the criminal charge.<sup>97</sup> Domestic violence courts may work with probation departments and

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89. *Id.* at 424.

90. *See id.* at 429.

91. *Id.* at 432–33.

92. *See* Leslie Paik, *Maybe He’s Depressed: Mental Illness as a Mitigating Factor for Drug Offender Accountability*, 34 LAW & SOC. INQUIRY 569, 581 (2009) [hereinafter Paik, *Maybe He’s Depressed*]; Leslie Paik, *Are You Truly a Recovering Dope Fiend? Local Interpretive Practices at a Therapeutic Community Drug Treatment Program*, 29 SYMBOLIC INTERACTION 213, 216–17 (2006) [hereinafter Paik, *Are You Truly a Recovering Dope Fiend?*]; Leslie Paik, *Organizational Interpretations of Drug Test Results*, 40 LAW & SOC’Y REV. 931, 933–34 (2006) [hereinafter Paik, *Organizational Interpretations*].

93. Paik, *Are You Truly a Recovering Dope Fiend?*, *supra* note 92, at 230.

94. *Id.* at 230–31.

95. *See* Paik, *Maybe He’s Depressed*, *supra* note 92, at 598–99; Paik, *Organizational Interpretations*, *supra* note 92, at 951.

96. Castellano, *supra* note 2, at 959.

97. *See id.* at 958–59.

batterers' programs to monitor and treat defendants;<sup>98</sup> drug courts may partner with agencies that offer services including "mental health evaluations, communicable disease . . . testing and education, clean and sober housing referrals, employment readiness or courses to improve job skills, an[d] educational assessment[s]." <sup>99</sup> This holistic approach strives to tailor clients' treatment in relation to circumstances extending far beyond the initiating criminal charge. Problem-solving courts thus expand their jurisdiction into the realm of structural issues related to poverty.

Of the variety of problem-solving courts, Homeless Court Programs (HCPs) may most frequently grapple with criminal charges stemming from conditions of poverty. Binder provides an overview of a Homeless Court Program established in San Diego.<sup>100</sup> The HCP is a special docket that aims to assist homeless defendants in resolving their outstanding misdemeanor offenses and warrants. It recognizes that homeless defendants face a number of obstacles within the traditional court system: they may not have the time or money to attend court hearings, they may be intimidated or scared based on their inability to pay fines, and, "[w]ithout counsel, most homeless persons are not in a position to fight the procedural or substantive issues a case presents."<sup>101</sup> The HCP attempts to resolve some of these issues by holding court in homeless shelters or service agencies and employing an alternative sentencing model that gives credit for participation in shelter agency activities, such as counseling, drug treatment, and volunteer work.<sup>102</sup> Clients voluntarily sign up to participate and legal professionals evaluate clients' participation based on advocacy letters provided by the shelter or service agency. In many cases, after compliance with the sentencing requirements, the charges or warrants are dropped.

While these kinds of programs help clients avoid being caught up in the criminal justice system, as described above, participation in problem-solving courts may be more onerous for clients than processes of traditional adjudication in some cases.<sup>103</sup> Problem-solving courts rely extensively on social service providers and often require that clients

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98. Berman & Feinblatt, *supra* note 1, at 132.

99. Peggy Fulton Hora, *A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm*, 37 *SUBSTANCE USE & MISUSE* 1469, 1475 (2002).

100. *See generally* STEVEN R. BINDER, *THE HOMELESS COURT PROGRAM: TAKING THE COURT TO THE STREETS* (2002).

101. *Id.* at 9.

102. *Id.* at 7.

103. Quinn, *supra* note 57, at 61.

participate in various programs or services.<sup>104</sup> Participation in these services in turn becomes a basis for monitoring and evaluating compliance. Whether these programs adequately address underlying issues of joblessness or homelessness is contingent upon the service providers. Within the problem-solving model, it is possible that clients are mandated to attend and participate in a range of programs that require extensive time and energy and provide little substantive assistance in return.

#### IV. FAMILY COURTS AND PROBLEM-SOLVING LOGIC

While problem-solving courts explicitly institutionalize a notion of judicial authority, similar practices may exist in traditional family courts. Spinak suggests that the concept of an activist judge is well established in the context of family court, citing a passage written in 1919 that describes the family court judge as authorized “to become the general supervisor and mentor of the home and its several occupants.”<sup>105</sup> Shdaimah and Summers describe the “one family, one judge model, in which one judicial officer oversees the entire juvenile dependency case from start to finish.”<sup>106</sup> These qualities—a therapeutic orientation and regular reviews before the same judge—aim to cultivate the personalized relationship between the judge and litigants that is a defining feature of problem-solving courts.<sup>107</sup> Babb suggests that the therapeutic jurisprudence, which underlies problem-solving courts, can be effectively integrated into family courts to achieve “outcomes that positively affect and even improve the lives of individuals, children, and families involved in family law proceedings.”<sup>108</sup>

While overlap between existing practices and problem-solving courts can characterize traditional family courts, some models, described below, have more explicitly incorporated problem-solving logic to address family law issues. The Unified Family Court model is one such model. Babb describes:

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104. Castellano, *supra* note 2, at 959.

105. Spinak, *supra* note 3, at 125 (quoting Willis B. Perkins, *Family Courts*, 17 MICH. L. REV. 378, 381 (1919)).

106. Corey Shdaimah & Alicia Summers, *Baltimore City’s Model Court: Professional Stakeholders’ Experience with Baltimore City’s One Family, One Judge Docketing*, 15 FAM. CT. REV. 286, 286 (2013) (citing NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995)).

107. Hora, *supra* note 99, at 1471–72, 1477.

108. Babb, *supra* note 45, at 643.

[A] Unified Family Court is a single court system with comprehensive subject matter jurisdiction over all cases involving children and relating to the family, including family breakup, child access, domestic violence, financial issues, creation and termination of the parent-child relationship, child abuse and neglect, and juvenile delinquency, among others. Under a Unified Family Court's auspices, the goal of the family justice system and the aim in family law proceedings is to provide a comprehensive resolution of a case tailored to the individual family's legal, personal, emotional, and social needs. The court accomplishes this outcome through judicial action, informal court proceedings, alternative dispute resolution, and appropriate social services.<sup>109</sup>

The Unified Family Court model resembles a problem-solving court insofar as it includes a separate docket for family cases, a treatment focus through collaboration with social service providers, and a holistic approach that aims to potentially address multiple, interwoven issues.<sup>110</sup> Given that scholars and practitioners have called for family court reform, the Unified Family Court model is offered as an alternative.<sup>111</sup> Others have similarly advocated for alternative dispute resolution options for family law matters and the integration of community-based and private-sector services.<sup>112</sup>

Child welfare cases provide an example of this incorporation of dual adversarial and problem-solving logics. These cases begin with a report of suspected child abuse or neglect within families. In many states, parents have the right to an attorney and the right to present evidence supporting their position in preliminary hearings and fact-finding hearings or adjudicatory trials.<sup>113</sup> Thus, they emphasize legal rights and procedural protections consistent with the adversarial model. Yet, like problem-solving courts, dispositions in these cases often involve referral to extra-legal support and treatment services. The goal of these proceedings is to “promote the well-being of children by ensuring safety, achieving permanency, and strengthening families” to care for their

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109. *Id.* at 644.

110. *See* Castellano, *supra* note 2, at 958–59.

111. *See* Babb, *supra* note 45, at 643.

112. *See generally* Gabrielle Davis, Nancy Ver Steegh & Loretta Frederick, *An Appeal for Autonomy, Access, and Accountability in Family Court Reform Efforts*, 52 FAM. CT. REV. 655 (2014).

113. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., UNDERSTANDING CHILD WELFARE AND THE COURTS (2022), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [<https://perma.cc/W7WR-VCNJ>].

children successfully.<sup>114</sup> Courts can require families to cooperate with services, thus paralleling the combination of treatment and judicial monitoring found in many problem-solving courts.<sup>115</sup>

However, others have identified emergent concerns raised by these kinds of programs. Spinak describes the Family Court Treatment Part in New York, which incorporates problem-solving structures including an activist judge, a team of legal and service professionals, and regular court appearances by the parties.<sup>116</sup> The program aims to address issues that often resulted in foster care, emphasizing family reunification.<sup>117</sup> Spinak argues that aspects of problem-solving courts may have disparate impacts on families of color.<sup>118</sup> She identifies two reasons: “The first is that by situating the central process of problem-solving for court-involved families in the court rather than in the community, the opportunity for pre-court assistance and services may be lost.”<sup>119</sup> The problem-solving model individualizes social problems and divorces them from their structural roots, failing to identify both the systemic lack of community or governmental resources and the existing neighborhood assets that could be brought to bear in strengthening families.<sup>120</sup> Her second critique involves the loss of due process protections in problem-solving courts. Spinak indicates that the activist judge and unconventional role of defense counsel “reinforces the power differential between the parent and the judge or other members of the court team. This can be silencing, manipulative, and scary.”<sup>121</sup>

Edwards describes the ethical issues raised for judges affiliated with Family Drug Treatment Courts (FDTC)—programs that are attached to juvenile dependency cases.<sup>122</sup> Through a problem-solving approach, the FDTC strives to intervene in addiction issues to foster “parental rehabilitation, child safety, and timely permanency.”<sup>123</sup> These courts are different than typical drug courts, as they do not focus on a criminal drug charge, but instead work with clients whose substance abuse issues have contributed to a case in juvenile dependency court. This makes the stakes of participation quite different: in contrast to working to avoid a criminal

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114. CHILD. ’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 2 (2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/BE6W-CWB2>].

115. *Id.* at 1, 5.

116. Spinak, *supra* note 3, at 114.

117. *See id.* at 114–15.

118. *Id.* at 117.

119. *Id.*

120. *See id.* at 118–19.

121. *Id.* at 129.

122. Edwards, *supra* note 52, at 1.

123. *Id.* at 2–3.

conviction and jail time, parents in the FDTC work to avoid the termination of parental rights. Edwards cites a number of issues that may arise in FDTC that potentially jeopardize a judge's ability to ethically operate within the canons of the Model Code of Judicial Conduct.<sup>124</sup> Namely, the protracted and personal relationship that the judge forms with the parent parties may make it more difficult for judges to avoid the appearance of impropriety, maintain impartiality, and prohibit ex parte communications.<sup>125</sup> Edwards concludes that FDTCs are proliferating and appear to be effective, but must be implemented cautiously in order to avoid judicial ethical violations.<sup>126</sup>

In sum, scholars and practitioners tend to see compatibilities between family law matters and problem-solving approaches. However, effectively institutionalizing such an approach requires recognizing and confronting the issues raised as legal professionals experience a transformation in their roles. It also requires careful examination of the power differentials between the various parties in the court setting. Attention to the possibility of coercion, given that the basic human right of child custody may be at stake, is particularly important.

#### *A. Proceedings as Adversarial*

We find that legal actors in our study provide wide-ranging characterizations of child support enforcement proceedings—as adversarial, non-adversarial, and problem solving. Rarely did respondents suggest that the proceedings were either completely adversarial or non-adversarial. Instead, they characterized adversarial versus problem-solving emphasis in proceedings as both coexisting and contingent. The comments of Family Court Commissioner Durand capture the coexistence of adversarial and problem-solving orientations. When asked if he considered proceedings to be non-adversarial, Commissioner Durand responded,

I guess they're not any more or less adversarial or non-adversarial than any other portion of family law. You either have an agreement or you don't, and then you hear from one side why they want it to be X and the other side why they want it to be Y, and you evaluate the factors,

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124. *Id.* at 5–15.

125. *Id.* at 5.

126. *Id.* at 15.

and you make a decision. But I won't count that as less adversarial.<sup>127</sup>

Durand describes a process that relies on the features of the adversarial system: parties' opportunity to present their case before a neutral arbiter. Yet, Durand also saw the proceedings as problem solving. He said,

I think almost everything we do at family court is problem solving. It's just different problems. I think it's just as much problem solving if you have a custody and placement case for someone who has AODA issues to make orders that will make it more likely that a person gets the treatment they need, than in a child support case to make orders that make it more likely that the person is going to find employment.<sup>128</sup>

Given this coexistence, legal actors suggested that the degree of adversarialism or non-adversarialism was contingent. Legal actors identified variation in the degree of adversarialism across cases. Defense attorney Wright suggests that, most of the time, child support involves agreement and only sometimes becomes adversarial: "I mean, when I hear litigation, I think of a contested issue, something where parties are disagreeing and they want an opportunity to present evidence to help the court make a decision, um, and that's not most often how it happens."<sup>129</sup> Thus, certain cases were more adversarial in nature than others.

Legal actors largely attributed the degree of adversarialism in a case to the parties involved. Many characterized the parents as the two primary adversaries. Child support attorney Shirlee Rose explained that the parents "feel as though they're in a contentious place. The guy feels like he's going to get screwed. The woman feels bitter. And I think you got to try to get them to talk because they really should, they're adults. They should be dealing with this on their own."<sup>130</sup> Legal actors also indicated that attorneys for the parents make the cases more adversarial. Assistant United States Attorney Alice Crum suggested that the proceedings were generally non-adversarial, but hedged, "I mean, you

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127. Interview by Chloe Haimson with Greg Durand, Fam. Ct. Comm'r, in Cnty. A, State A (June 2, 2016) (on file with authors).

128. *Id.*

129. Interview by Sarah Ishmael with Anthony Wright, Def. Att'y, in Cnty. A, State A (June 2, 2017) (on file with authors).

130. Interview by Tonya L. Brito with Child Support Att'ys, Grp. A, in Cnty. B, State B (Jan. 30, 2015) (on file with authors).



have those private attorneys that are going to come in and could be adversarial about what color the sky is, that's just how they are."<sup>131</sup> Assistant United States Attorney Shirley Hardy conveyed a similar sentiment, saying, "by bringing your attorney in, they're making it adversarial. Because now, they want all these different things."<sup>132</sup> Assistant United States Attorney Alexander Jordan also suggested that defense counsel made proceedings more adversarial:

And there's a lot of pressure on private counsel, who represents mom and represents dad, you know, get that guy. And, uh, that's oftentimes what they do. Being the state, we can provide a much less adversarial, uh, environment when we're dealing with two pro se litigants. So, if it's just the state, the mom, and the dad, I think it *can* be less adversarial.<sup>133</sup>

Legal actors also suggested variation in the degree of adversarialism within a single case. Assistant United States Attorney Hardy explained, "I truly believe it's adversarial."<sup>134</sup> But, she suggested that certain procedures could make the proceedings less adversarial, saying, "We try to make it less adversarial by conferencing cases, by letting people make decisions that are best for themselves and for the child."<sup>135</sup> She concluded that the process "starts as adversarial, but becomes problem-solving."<sup>136</sup> Assistant United States Attorney Crum expressed a similar sentiment when she explained, "in any situation that I've worked in this office, I think things can be worked out without having to be adversarial and down each other's throats because I think we're all working for the common goal, which is a just and fair outcome."<sup>137</sup>

Multiple attorneys for the state suggested that they had the capacity to make the proceedings less adversarial. Child support attorney Rich Aldridge commented on the role of the government child support attorney:

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131. Interview by Tonya L. Brito with Alice Crum, Child Support Att'y, in Cnty. A, State B (Aug. 1, 2016) (on file with authors).

132. Interview by Garrett Grainger with Shirley Hardy, Child Support Att'y, in Cnty. B, State B (Feb. 27, 2015) (on file with authors).

133. Interview by Jia-Hui Stefanie Wong with Alexander Jordan, Child Support Att'y, in Cnty. B, State B (Feb. 24, 2015) (on file with authors).

134. Interview by Garrett Grainger with Shirley Hardy, *supra* note 132.

135. *Id.*

136. *Id.*

137. Interview by Tonya L. Brito with Alice Crum, *supra* note 131.

We'll make sure there's ample evidence as to what's available anyway, that the judge gets a chance to look at so he can make a good decision. So that, I guess, helps protect the rights of the children to get fair support. But it isn't necessarily mom's side or dad's side. And it just, we'll make sure the court gets a chance to see records that otherwise would not get presented.<sup>138</sup>

This representation positions child support attorneys closer to the caseworkers in problem-solving courts who may update the judge on a client's progress.

These characterizations of the adversarial nature of child support enforcement drew upon particular understandings of adversarialism that seemed to be rooted more in lay terms than legal understandings. Assistant United States Attorney Hardy described, "Adversarial to me is where it's kind of like, it's tension. There's clear tension between the two parties. Um, so that, to me, is adversarial because neither one of them can come to an agreement without the intervention of the judge."<sup>139</sup> By framing adversarialism in this manner, legal actors suggested that representation for litigants was a non-necessity and downplayed the interests of the state in these proceedings. Some judges and other legal actors in our study suggest that child support enforcement is not necessarily an adversarial process—thus litigants do not need representation because other actors can address the problems underlying nonpayment. Child support attorney Jeffrey Yedinak described training the new lawyers joining the state attorney's office:

[W]e always teach them, don't be adversarial. You know, a lot of times, these people don't have an attorney. And as soon as you start pushing, people are going to start pushing back and you're not going to get anywhere, and these poor people have to continue to come back. So we do our best to do what's legally right and to get an agreement.<sup>140</sup>

In another focus group, child support attorney Courtney Booth noted, "I tell respondents you really don't need an attorney unless you want one, because I'm going to be fair and I'm going to tell you what's

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138. Interview by Tonya L. Brito with Rich Aldridge, Child Support Att'y, in Cnty. C, State A (Oct. 22, 2012) (on file with authors).

139. Interview by Garrett Grainger with Shirley Hardy, *supra* note 132.

140. Interview by Tonya L. Brito with Child Support Att'ys, Grp. A, *supra* note 130.

what.”<sup>141</sup> Legal actors’ perceptions of the goals and methods of child support enforcement can have important impacts on how litigants experience enforcement proceedings. We investigate how legal actors describe the enforcement process—if they understand it as adversarial, non-adversarial, or problem solving.

This is particularly notable in relation to the cases we observe because, in a majority of them, the custodial parent is receiving state benefits and attorneys for the child support agency have an interest in collecting support for the sake of reimbursing the state. But when adversarialism is framed as a matter of antagonism between parents, exacerbated by defense counsel, the state can assume the role of mediator, rather than an adversary itself. As suggested by Attorney Booth’s quote, legal actors can thus discourage litigants from pursuing representation. Even as they recognize pro se individuals’ struggles to self-represent. In this same focus group where Attorney Booth made her comments, child support attorney April Liles described unrepresented litigants: “they don’t understand the magnitude of what they’re saying is testimony. They don’t understand that it’s evidence. Yeah. You can be thrown in contempt.”<sup>142</sup>

### *B. Problem-Solving Individual Problems*

Though legal actors identify non-adversarial and problem-solving features of child support enforcement proceedings, there is no shared definition of the social, human, and legal problems implicated in these hearings. This distinguishes these proceedings from problem-solving courts, which generally center a specific treatment program that draws upon a theory of the underlying problem. For instance, many domestic violence courts incorporate batterer programs to some degree.<sup>143</sup> These programs locate the problem of domestic violence in things like offenders’ attitudes about control, errors in thinking, and lack of effective anger management strategies.<sup>144</sup> They rely on treatments like cognitive behavioral therapy and psychoeducational curriculum in an effort to change the future behaviors.<sup>145</sup> A clear definition of the problem corresponds to proposed treatment solutions. In child support

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141. Interview by Amanda Ward with Child Support Att’ys, Grp. B, in Cnty. B, State B (Jan. 30, 2015) (on file with authors).

142. *Id.*

143. See Laura A. Voith, Patricia Logan-Greene, Terri Strothoff & Anna E. Bender, *A Paradigm Shift in Batterer Intervention Programming: A Need to Address Unresolved Trauma*, 20 TRAUMA VIOLENCE & ABUSE 1, 2 (2018).

144. See *id.* at 2–3.

145. *Id.*

enforcement, different notions of the underlying problems that contribute to nonpayment suggest correspondingly different interventions.

Accounts diverge in their emphasis on individual or attitudinal factors versus structural factors. Legal actors who locate the problem within litigants themselves suggest that failures in personal responsibility explain noncustodial fathers' inability to acquire a job, to comply with a child support order, or to come to court prepared. A comment by child support attorney Scott Pilcher illustrates,

You have to see the relationship between people that are in the child support system and also the people that are in the criminal justice system. And there is a high percentage of them that overlap and whatnot. So these are people that in general, you know, don't take their responsibilities seriously.<sup>146</sup>

Defense attorney William Plumlee had a similar analysis:

Say someone's in jail, and they come out, then they go back and forth, like you see people. You know, why do they keep going to jail? Why don't they stop stealing, or why don't they stop doing drugs? Why don't they stop drunk driving, you know? Why do they stop paying child support? Why can't you get a job? . . . It's sort of like, if you pay attention, you shouldn't go to jail.<sup>147</sup>

Themes of personal responsibility and choice pervade these kinds of accounts—if people took their responsibilities seriously or paid attention or just stopped engaging in pathological behaviors, their problems would resolve.

Framing the problem as a matter of personal responsibility suggests corresponding projects of socialization and behavior modification that aim to transform litigants' attitudes toward payment, often by transforming their attitudes about work and/or parenting. Child support attorney Shannon Grey captured this sentiment in her comment:

I think more of a key area to me than anything—we really need the dads more engaged. I think if we could find a way to do that, so that maybe if we had more engaged

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146. Interview by Tonya L. Brito with Child Support Att'ys, in Cnty. C, State A (Oct. 22, 2012) (on file with authors).

147. Interview by Amanda Ward with William Plumlee, Def. Att'y, in Cnty. B, State A (July 7, 2014) (on file with authors).

fathers, maybe we'd have better funding for child support. And the dads would be more willing to pay the child support.<sup>148</sup>

She further noted, "I know the way kids are raised when they're in single parent families; sometimes a father is considered a non-necessary party."<sup>149</sup>

These efforts to transform attitudes toward parenting manifest most clearly in referrals to responsible fatherhood programs. Responsible fatherhood programs locate the problem of nonpayment in noncustodial fathers' lack of attachment to the parenting role.<sup>150</sup> Judge Matthew Covarrubias commented on this, saying,

[F]or a lot of these guys, the relationship with the mom wasn't a particularly meaningful one or a long-lasting one. The kids are kind of like, it's almost like neighbor kids. Yeah, that's a cute kid, you know, I might do something. But it's such a weak bond to begin with, not only to the child, but so often to the mother.<sup>151</sup>

Pierce Roegner, the executive director of an agency that runs such a father program, described it: "it is a program of reunification, keeping men involved in children's lives, teaching responsible fatherhood and anger management."<sup>152</sup> These programs emphasize parenting practices and skills. Roegner described a manifestation of the program's success in a group of men who continued to meet to discuss family matters after graduating from the parenting class, saying "they just come and sit and talk to each other about issues, problems, raising their kids, girlfriends, wife problems, and they basically help each other."<sup>153</sup>

Roegner's program also included a job readiness component that focused on changing obligors' relationship to a job. He described:

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148. Interview by Tonya L. Brito with Shannon Grey, Child Support Att'y, in Cnty. C, State A (Oct. 22, 2012) (on file with authors).

149. *Id.*

150. See Carolyn Pape Cowan, Alan J. Hawkins & Philip A. Cowan, *Responsible Fatherhood Programs: Children Benefit from a More Integrated Family Approach*, SOC'Y FOR RSCH. CHILD DEV. (Aug. 19, 2022, 10:00 AM), <https://www.srcd.org/research/responsible-fatherhood-programs-children-benefit-more-integrated-family-approach> [<https://perma.cc/G7SA-QTPM>].

151. Interview by Tonya L. Brito with Matthew Covarrubias, Fam. Ct. Judge, in Cnty. A, State B (July 15, 2015) (on file with authors).

152. Interview by Daanika Gordon with Pierce Roegner, Dir. of JOBS Program, in Cnty. A, State A (Jan. 6, 2015) (on file with authors).

153. *Id.*

When a person hasn't worked for a long period of time, they're not used to getting up on time. They're not used to getting to where they've got to go, which is a bus stop, or even getting to the job and not having the discipline to go in and check in or punch the clock on a timely basis, to the point where they're not being penalized for checking in late. They could already be there, but just not punching in. See, they have to relearn those habits, and they have to make them habits to a point where they become commonplace rather than something that I've got to think about doing.<sup>154</sup>

Both of these kinds of interventions seek to modify the attitudes and behaviors of obligors to make them more compliant.

### *C. Problem-Solving Structural Problems*

Other legal actors suggest that the underlying causes of nonpayment are structural in nature. These accounts recognize that the barriers poor noncustodial fathers face in making payments have systemic origins. Defense attorney Wright provided a hypothetical that captured many structural factors other legal actors also cited:

If a person was over the age of 18, didn't have a high school diploma, maybe had some felony convictions that make getting a job difficult, and maybe had like a driver's license that was suspended, then I know in my mind that lots of the jobs for which this person would qualify for are probably off the bus line. Like there are lots of factories and things like that that are not on the city bus line, but that's a barrier.<sup>155</sup>

Wright continues, describing how a case of this nature should be handled:

It might mean that this person, instead of having a child support order set at the imputed minimum wage . . . may need something lower as an interim order and then also a referral to a program called [JOBS Program]. And

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154. *Id.*

155. Interview by Sarah Ishmael with Anthony Wright, *supra* note 129.

[JOBS Program] will help that gentleman overcome his barriers to employment, I think, provide some kind of job readiness training, maybe help him get a resume together, maybe help him find ways to get bus tickets, um, or overcome the barrier of transportation, you know.<sup>156</sup>

This kind of understanding encourages the problem-solving court approach of collaboration with extra-legal agencies who provide services to clients across various realms. This perspective is more likely to acknowledge the importance of poverty and labor market dynamics—including the consequences of a felony record and the possibility of discrimination. Legal actors referenced programs with services like expungement, job readiness training, and child support arrearage reductions. Many of these programs continued to focus interventions on litigants themselves; job readiness training does not seek to fundamentally restructure labor market dynamics, it aims to prepare litigants to operate more effectively in existing systems. Nevertheless, these kinds of programs acknowledge and try to address inequalities in resources and opportunities.

However, referring litigants to such programs was not a widely or systematically institutionalized practice. While legal actors cited the employment challenges presented by a criminal record, a minority cited corresponding services that could assist litigants in addressing this challenge. This may reflect a real dearth of resources or legal actors' lack of knowledge of available resources. In either case, the incorporation of extra-legal service providers in these proceedings is only partial and this reflects the structure and capacities of the enforcement process. Commissioner Durand explained that ultimately solving the problem of poverty is outside of the scope of the enforcement process. He elaborated, "I think that it's good to have programs to try to help people out of that poverty, but you have to recognize, we can't fix all of that here. We're not trying to fix all of that here. We have to take what we're given."<sup>157</sup>

#### CONCLUSION

Legal actors see both adversarial and non-adversarial features in child support enforcement proceedings. However, as they develop personal and potentially conflicting orientations toward their work,

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156. *Id.*

157. Interview by Chloe Haimson with Greg Durand, *supra* note 127.

litigants bear the consequences. Legal actors' suggestion that the adversarial nature of cases can be minimized may deny litigants the opportunity to zealously advocate for their position—either in the form of effective self-representation or by acquiring an attorney. Competing understandings of the problems underlying the nonpayment of support also suggest that litigants don't derive the full benefits of a problem-solving model. Connections to services around job access, educational attainment, expungement, transportation, and other structural issues are irregularly or partially institutionalized. Some litigants may receive the benefits of such connections, while others may not, and this may be contingent on the knowledge and dispositions of the particular legal actors that litigants encounter during the process. At the same time, litigants may be subject to the expanded supervisory role of the state. As they are referred to programs that aim to make them better parents and more productive citizens. Variation in legal actors' approaches to these cases may undermine both the rights and protections of the adversarial model and the service provision of the problem-solving model.